THE POWER OF COLLABORATION

RISK MANAGEMENT FOR LOCAL OFFICIALS

MUNICIPAL EXCESS LIABILITY JOINT INSURANCE FUND • MEL •

MEL

David N. Grubb

The Power of Collaboration
Risk Management for Local Officials

This book is a part of an ongoing program to acquaint local officials with Risk Management principles. It is designed to provide a general understanding of the legal principles pertaining to governmental operations. Seek the advice of your local government's attorney to evaluate any particular case or circumstance.

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Since 1990, David Grubb has been Managing Director of PERMA Risk Management Services and Executive Director of the Municipal Excess Liability Joint Insurance Fund (MEL). He started his risk management career in 1971 at Lipton Tea before joining A&P Supermarkets, where he was Director of Insurance and Pension Investments.

Elected to the Park Ridge Borough Council in 1977 and as Mayor in 1984, Grubb chaired the committee that established the first New Jersey municipal JIF and was elected the JIF's inaugural Chairman. In 1986 during Grubb's term as Mayor, Governor Thomas Kean appointed him as a Deputy Insurance Commissioner to manage the state's response to the mid-1980s insurance crisis. He also chaired the National Association of Insurance Commissioners (NAIC) Workers' Compensation and the Environmental Liability Committees.

After the end of the Kean Administration in 1990, Grubb and Jim Kickham acquired PERMA from Joe Vozza and built the MEL program into the largest municipal pool in the country. Grubb re-entered local government in 1994 when he was elected to two terms on the Ridgewood Village Council. He also founded the non-profit New Jersey Safety Institute.

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MEL Joint Insurance Fund Member Savings

Member Joint Insurance fund	Established	JIF Savings as of Jan. 1, 2020 (millions)	JIF Membership	Individual JIF Member Savings (millions)
Bergen	1985	$270.9	38	$7.1
South Bergen	1986	$232.5	23	$10.1
Atlantic	1987	$379.2	41	$9.2
Camden	1987	$200.6	37	$5.4
Mid-Jersey	1987	$172.9	12	$14.4
Morris	1987	$218.5	44	$4.9
Ocean	1987	$316.0	31	$10.2
PMM	1987	$80.7	5	$16.1
Monmouth	1988	$249.3	41	$6.1
Burlco	1991	$109.0	27	$4.0
TRICO	1991	$210.8	38	$5.5
NJ Utility Authorities	1991	$173.2	70	$2.5
NJ Self-Insurers	1992	$66.5	5	$13.3
Suburban Essex	1992	$105.3	12	$8.8
NJ Housing Authorities	1994	$103.0	89	$1.2
Suburban Municipal	1994	$73.6	10	$7.4
PAIC	1997	$120.7	23	$5.3
Central Jersey	1998	$157.8	10	$15.8
First Responders	2009	$27.6	38	$0.7
	Totals	$3.3 Billion	594	Average $5.5 Mil.

INTRODUCTION

Insurance and related employee, liability, and property claims cost New Jersey governments over $1 billion each year. [1] Had it not been for the widespread adoption of risk management in the mid-1980s, that figure would easily have been double.

Risk Management goes considerably beyond insurance. For example:

- When New Jersey substantially increased safety training requirements, the Municipal Excess Liability Joint Insurance Fund (MEL) established the MEL Safety Institute that currently trains over 50,000 MEL member employees each year. Go to the website NJMEL.org for complete details.
- After a devastating fire struck the Edison DPW garage and destroyed the township's fleet of heavy-duty trucks two days before a major snowstorm, adjusters for the Central Jersey JIF found a fleet of heavy trucks available for lease in another state. The replacement equipment arrived in Edison just hours before the storm.
- At the beginning of the COVID-19 pandemic, New Jersey municipalities experienced serious problems selling municipal bonds. The MEL established a Joint Cash Management and Investment (JCMI) pool to purchase debt securities issued by the MEL's members – a major factor in stabilizing the bond market for local governments across New Jersey. This effort was started and led by several commissioners, especially Jon Rheinhardt (Morris JIF) and Chuck Cuccia (South Bergen JIF).

The concept of risk management dates to the mid-1950s when large corporations combined insurance, claims management and safety into a single department.[2] The idea was to better coordinate these three functions to reduce costs.

Risk management initially focused on exposures that are usually insured, but soon expanded to include issues that could seriously disrupt the organization but are not insured. This is known as "Enterprise Risk Management." Local governments must address many issues of this nature. For example, while pedestrian accidents rarely cause claims against local government, pedestrian safety is a major concern for voters and elected officials.

History of Risk Management for New Jersey Local Government

Prior to 1911, governmental entities only purchased fire insurance because governments could not be sued for negligence under the doctrine of sovereign immunity.[7] This changed with the adoption of the Workers' Compensation statute which effectively required most governmental units to buy workers' compensation policies because they were not large enough to self-insure.

In 1925, New Jersey public entities became liable for auto accidents.[8] Thirty-four years later, the courts limited sovereign immunity to issues of discretion.[9] Finally in 1970 the New Jersey Supreme Court overturned sovereign immunity and invited the legislature to define when a public entity should be liable.[10] The legislature responded by enacting *Title 59, the Tort Claims Act.* Other court decisions also made public entities liable for civil rights issues and environmental damages.

Today, workers' compensation represents approximately 50% of the property/casualty insurance budget for local governments. Liability claims including *Title 59*, civil rights and environmental are another 40%, and the remaining 10% insures property damage including fire, flood, and vehicles.

Local governments did not commonly adopt risk management until the mid-1980s. In 1981, ten towns in northern Bergen County studied the idea of creating a self-insurance pool. When the Pascack Valley Mayors Association contacted the Department of Insurance, it was informed that the legislature must first adopt an enabling statute. By late 1983, both the New Jersey School Boards Association (NJSBA) and the New Jersey State League of Municipalities (NJLM) successfully lobbied for this legislation.

At this point, municipalities and schools took different approaches. The School Boards Association created a large statewide pool that currently insures 375 school districts. The League of Municipalities encouraged local groups to form individual funds. The Pascack Valley Mayors Association established the first municipal JIF effective New Year's Day, 1985.

Later that year, the liability insurance market for governmental entities crashed because of an increase in lawsuits against public entities. Insurers were especially concerned about environmental liability.[11] During this insurance crisis, the Bergen County Municipal JIF became the model for numerous other groups that formed similar local municipal pools around the state.[12] Some boards of education also created local JIFs rather than joining the statewide NJSBA pool.

When excess coverage became unavailable to cover large claims, the Bergen JIF proposed the creation of a "Super JIF" made up of numerous JIFs and self-insurers. The idea was based on a concept commonly used by large corporations with captive insurance companies. [13] This proposition resulted in the establishment of the Municipal Excess Liability JIF (MEL) by the Morris County Municipal JIF and the Atlantic County Municipal JIF at the beginning of 1987. Over the next two years, seven other JIFs including the original Bergen pool joined the MEL. [14]

With reasonably priced excess insurance available from the MEL, the now 19 affiliated JIFs expanded into one of the largest self-insurance pooling programs in the country. [15] As of early 2020, total savings for MEL members were estimated at $3.3 billion, including $1.8 billion from improved safety and $1.5 billion from reduced non-claim costs.

Organizing a Local Government Risk Management Program

To achieve long term results, a risk management program must be structured so that it is consistent.

- Senior Management Involvement: The program must start with the governing body taking an active part in the program. The status of the risk management program should be a monthly topic on the governing body's workshop agenda, so that management can communicate its priorities based on its observations. Members of the governing body should also complete periodic risk management training. [16]
- Risk Management Consultant: Unlike other states, most New Jersey local governments are too small to have an in-house risk management department and depend on an appointed risk management consultant, often a local insurance agent. [17] These professionals are responsible for numerous risk management functions, which are detailed in JIF By-laws. Risk managers are selected in accordance with the public contracts law including "pay to play" regulations. In most JIFs, the fees are about half of the commissions paid by commercial insurance companies.
- Safety Committee: This committee coordinates the risk control program. It should be collaborative and include the risk management consultant and representatives from management, collective bargaining units and non-union employees.
- Litigation Risk Committee: Every local government should also have a committee to monitor the status of lawsuits and put plans into place to reduce potential liabilities. It should be comprised of the Mayor or authority chair, manager or executive director, the local unit's attorney, senior managers [18] and the risk management consultant.

Coverage

Another advantage of the risk management revolution is improved coverage. Before the advent of the JIFs, local governments went through the time-consuming process of purchasing numerous insurance policies, including workers' compensation, general liability, police professional liability, auto liability, property and position bonds from different insurers. All of these policies are combined into a single master program with JIFs, which reduces work and eliminates the possibility of different insurers arguing over which one is responsible for a claim.

Since JIFs are governmental entities, towns that are JIF members are not required to seek multiple insurance bids every three years. Most towns prefer to remain in the local JIF that insures its neighbors. Under the public contracts law, [19] a governmental entity does not need to seek competitive quotations before entering into a contract with another governmental entity that is itself in compliance with the public contracts law.

To solve the problem of lack of environmental coverage, 13 JIFs established the New Jersey Municipal Environmental Risk Management Fund(E-JIF). The E-JIF provides the most extensive pollution liability coverage available to local governments anywhere in the country. It also saves taxpayers tens of millions of dollars by conducting a comprehensive environmental risk control program and limiting legal costs. An example of the cost saving benefits of the E-JIF, when the state required local officials and employees to complete stormwater management training, it lacked the funds to develop the program. The E-JIF wrote and produced a one-hour training video that was distributed to all members and made available to non-members.

Commissioner Control

An important factor in the success of the JIFs is that they are controlled by their Commissioners. Each member appoints one of its elected officials or employees to serve as a Fund Commissioner. The Commissioners meet monthly to decide the Fund's business. Over 300 local officials participate in the governance of their local JIFs each month. As a result, they are continually exposed to the importance of safety and claims control.

Conclusion

Local Government risk management is becoming more complicated with new exposures such as land use liability and technology risk management. However, workers' compensation remains the largest cost driver, followed by the more expensive types of liability claims. Because 85% of the final cost is claims, members' monthly collaboration in the governance of their JIFs is critical in the dramatic reduction of the accident rate and savings of non-claim costs.

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[1] This includes the state, counties, authorities, schools and municipalities.

[2] The term risk management was coined in 1955 by Wayne Snider, Professor of Insurance at Temple University.

[3] 65% of New Jersey municipalities and local authorities are members of the 19 local JIFs that created the Municipal Excess Liability Joint Insurance Fund (MEL) in 1987. Another 30% belong to JIFs that are not affiliated with the MEL. Most of the remaining municipalities are large self-insurers.

[4] In 1991, the average employee accident frequency for MEL members was 5.73 lost time accidents per 100 full time employees, consistent with both state and national averages for municipal government. Today, the MEL average frequency is about 1.8 lost time accidents per 100 full time employees.

[5] Non-claim costs include administration, general legal, safety, claims adjusting expense and fees to insurance agents.

[6] The average non-claim cost for MEL member JIFs is 15% compared to 31% for commercial property casualty companies.

[7] Freeholders of Sussex v. Strader (1840)

[8] Florio v. Jersey City (1925)

[9] Bedrock Foundations v. Brewster (1959)

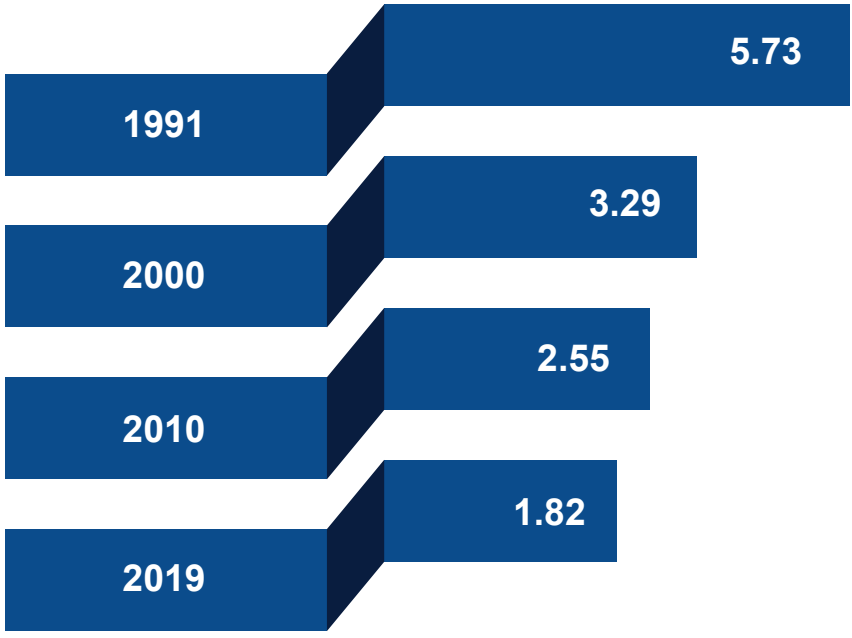
[10] Willis v. N.J. Department of Conservation (1970)

[11] Ayers v. Jackson Township 106 N.J. 557 (1987)

[12] In a New York Times article dated February 23, 1986, the NJ Department of Insurance predicted that the Bergen model could save New Jersey taxpayers between $50 and $100 million per year, which is exactly what has occurred.

[13] The model for the MEL was the United Insurance Company of Grand Cayman, a captive insurance company that still provides excess insurance to its owner captives.
[14] Other early JIFs that joined the MEL were Camden, Ocean, Mercer, Professional Municipal Management, Bergen, South Bergen and Monmouth.
[15] There are six additional local unit JIFs in NJ that have no affiliation with the MEL.
[16] The MEL offers training each year throughout the state, and towns and authorities receive a discount for each governing body member who completes the training. The training changes each year and includes topics such as employment practices, ethics, land use liability, cyber risk management and protecting children from abuse.
[17] The MEL periodically conducts an accreditation program for risk management consultants.
[18] The Litigation Risk Committee may include the heads of high-risk departments such as police and DPW.
[19] NJSA 40A:11-5 (b) exempts from bidding contracts between governmental entities. This section specifically provides that, "Any contract the amount of which exceeds the bid threshold may be negotiated and awarded by the governing body without public advertising for bids and bidding therefore and shall be awarded by resolution of the governing body if: (2) it is to be made or entered into with the United States of America, the State of New Jersey, county or municipality or any board, body, officer, agency or authority thereof or any other state or subdivision thereof." A Joint Insurance Fund is a local unit of government.

MEL Members Accident Frequency
Lost Time Accidents per 100 Full-time Employees



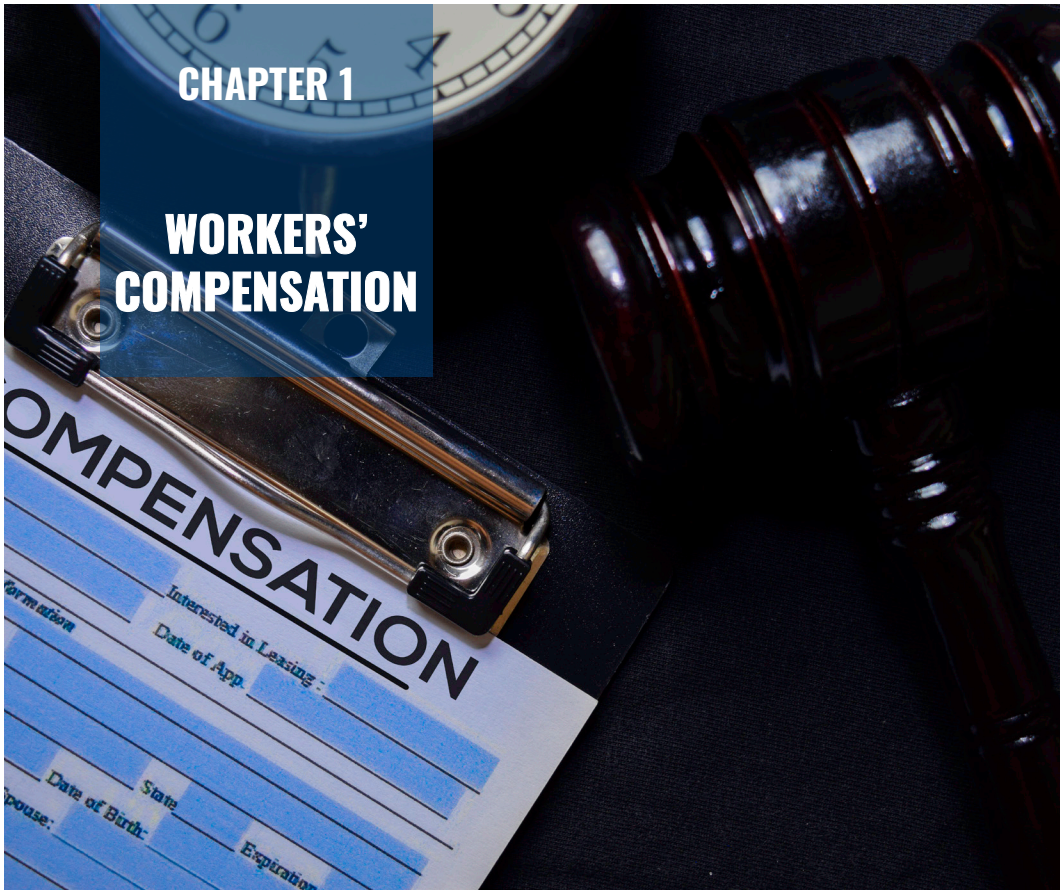
PART 1

EMPLOYEE ACCIDENTS

The Safety Committee plans and implements the risk control program. It should be collaborative and include the risk management consultant and representatives from management, collective bargaining units and non-union employees.

Model Safety Policy

The (employer name) will provide a safe and healthy work environment and shall comply with all applicable safety and health regulations. The (employer entity) is equally concerned about the safety of the public. Consistent with this policy, employees will receive periodic safety training and will be provided with appropriate safety equipment. Employees are responsible for observing safety rules and using available safety devices including personal protective equipment (PPE). Failure to do so constitutes grounds for disciplinary action. Any unsafe condition, practice, procedure or act must be immediately reported to the supervisor or department head. Any on-the-job accident or accident involving (employer entity) facilities, equipment or motor vehicles must also be immediately reported. The (employer name) has established a Safety Committee that meets on a regular basis to recommend solutions to safety problems. Employees are encouraged to discuss safety concerns with their Safety Committee representative.



This chapter provides an overview of key issues relating to Workers' Compensation Law *N.J.S.A. 34:15-1 et. seq.* Most of the material referenced is from John Geaney's, New Jersey Workers' Compensation Manual, 2019 edition.

Half the cost of local property/casualty claims in local government is attributed to workers' compensation. Fortunately, effective safety programs can dramatically lower accident rates. Since 1991, JIF members have reduced their accident rates by an average of over 65%.

Background

Until the beginning of the 20th century, employees injured on the job were forced to sue their employers for negligence under common-law. These lawsuits were routinely delayed for years, and ultimately, most were unsuccessful due to the numerous defenses available to an employer. This left families destitute and dependent on charity.

In 1911 New Jersey became the first state to adopt a permanent Workers' Compensation law where benefits are provided for traumatic injuries and occupational disease. The New Jersey Supreme Court defined an "accident" as an "unlooked for mishap or untoward event that is not expected or designed."[20] "Occupational disease" involves injuries caused by "repetitive activity or exposures over time."

Workers' compensation coverage is no-fault. The petitioner must establish that the injury occurred during the course of work (time concept) and arose out of work (causation concept). The petitioner does not need to prove that the employer was negligent or contributed to the cause of the accident.[21] Workers' compensation is normally the employee's "sole" recourse against the employer unless the employer intentionally caused the accident. However, recent court decisions have held that if the employer deliberately violates a safety standard that creates the substantial certainty of an accident, this will be considered an "intentional wrong," opening the door to tort litigation.[22] Fortunately, these cases are very rare.

Who is considered an employee under the Workers' Compensation Act?

As a general principle, workers' compensation covers anyone hired as a "regular" employee but not "casual" employees. An employee must have a job that is regular, periodic or reoccurring to be covered.[23] If there is any doubt, the court will grant coverage.

The courts have also found that independent contractors are covered by an employer's compensation policy if the employer exercises effective control over the independent contractor as if the contractor was an employee, or if the employer has a long-term economic dependency on the independent contractor. The Act also provides that any contractor placing work with a subcontractor is responsible for workers' compensation claims if the subcontractor fails to purchase insurance.[24] Therefore, it is good practice to make sure all independent contractors have in-force workers' compensation policies.

Volunteers are not employees and normally are not covered under the Act.[25] There is a special provision that makes some governmental volunteers eligible for Workers' Compensation coverage. Specifically included are elected and appointed officials, Board of Education members, volunteer firefighters, first aid or rescue squad workers, and reserve or auxiliary police officers.[26]

For volunteer firefighters and rescue workers, "in the line of duty" means, "participating in any authorized construction such as installation, alteration, maintenance or repair work upon the premises, apparatus, or other equipment owned or used by the fire company, first aid or rescue squad." It also means, "Participating in any authorized public drill, showing, exhibition, fund raising or parade."

Under state law, prisoners and individuals performing court-ordered community service are not covered for workers' compensation.[27]

When during the workday is an employee covered?

As a general principle, coverage begins when an employee arrives at the employer's premises and ends when the employee leaves. The employer's premises includes the parking lot if it is owned or controlled by the employer, otherwise, it is the entrance. However, just because an injury occurred on the employer's premises does not automatically mean that it is compensable. For example, there is no coverage for an employee who is injured in an attack that was triggered by a personal dispute that had no connection to the employee's duties.[28]

Employees are not covered while commuting to their regular workplace but are covered while traveling on business to places other than their regular workplaces. If they leave from home and do not go to their regular place of employment first, they may be covered when the route deviates from their normal commute.

While there are special provisions relating to first responders, they are not "on-duty" 24 hours a day for purposes of workers' compensation. When there is a "call out" volunteer first responders are covered when traveling from home to the station to pick up emergency vehicles or when responding directly to the scene. All career and volunteer responders are eligible for workers' compensation if they are injured in an emergency that happens in their jurisdiction while "off-duty," even if not specifically called out. Coverage also applies if they "come upon" an emergency outside of their regular jurisdiction. However, first responders are not covered in other situations if they respond without proper authorization while "off-duty."

There is often confusion when employees are injured in car accidents. The courts have ruled that an employee is only covered by workers' compensation while on the employer's business. There is no coverage under workers' compensation if the employee is on personal business when an auto accident occurs even if the employee is driving an employer-owned vehicle. [29] However, in this situation the employee is covered by both the employer's and the employee's auto insurance policies. Further, an employee is also covered by workers' compensation while operating a privately-owned vehicle on the employer's business. The coverage trigger is being on the employer's business.

Employees are normally covered while in the employer's lunchroom but not when going off-premises to eat. [30] However, employees who are away from their normal worksite on business may be covered for "minor deviations" from their routes. [31] For example, if an employee is out of the office on business, there is coverage if the employee slips in a restaurant parking lot while going to lunch. These cases are very fact sensitive.

Occupational Disease Claims

Occupational disease claims involve injuries or illnesses caused by repetitive activity or exposures over a period of time. The petitioner must show that the disease is due to causes and conditions that are characteristic of a particular trade, occupation, process or place of employment, and that the contribution of work to the disease was material. [32] Claims under this portion of the Workers' Compensation statute include various muscular/skeletal issues and hearing loss. The New Jersey Workers' Compensation Courts also accept claims for Post-Traumatic Stress Disorder (PTSD) [33] and Lyme disease. [34]

Claims for heart attacks are more difficult to establish under a 1979 amendment to the Act. The petitioner must now show that the heart attack or stroke was caused to a material degree by on-the-job work effort or strain in excess of the wear and tear of daily living.

The New Jersey Supreme Court ruled in 1995 that to be compensable, heart disease must also be: "(1) due in a material degree to causes which are characteristic to a particular occupation, (2) the work exposure exceeds the exposure caused by the workers' personal risk factors such as smoking, and (3) the employment substantially contributed to the development of the disease."[35] This means that without the exposure, the disease would not have developed to the extent that it caused the employee's incapacity to work. [36]

A heart attack or stroke suffered by an on-duty police officer or firefighter is presumed to be compensable under a special provision in the statute. The presumption can be rebutted by the preponderance of the evidence that the condition is unrelated to an on-the-job exposure. As a practical matter, this means almost all on-duty police and fire fighter heart attacks and strokes receive at least some compensation. In 2003, this concept was extended to emphysema contracted by firefighters. [37]

Under legislation adopted in 2019, cancer is also presumed to be job-related if the firefighter has at least seven years' experience on the job. The presumption covers both career and volunteer firefighters and expires when the firefighter reaches age 75. As with heart attacks, the presumption can be rebutted by the preponderance of the evidence that the cancer is unrelated to firefighting. [38]

Under the same legislation, public safety workers are also eligible for the presumption when exposed to communicable diseases. A-1741 provides that:

> "If in the course of a public safety worker's employment, the worker is exposed to any pathogen or biological toxins … related to … epidemics, including airborne exposure, then all care or treatment of the public safety worker, including testing, diagnosis, surveillance or other services …. and all time during which the public safety worker is unable to work while receiving the care or treatment, shall be compensable … If it is ascertained that the public safety worker has contracted a serious communicable disease or related illness …. there shall be a presumption that any injury, disability, chronic or corollary illness or death … is compensable … but this presumption may be rebutted by the preponderance of the evidence that the exposure is not linked to the occurrence of the disease.
>
> "A Public safety worker includes, but is not limited to, a member, employee, or officer of a paid, partially-paid, or volunteer fire or police department, force, company or district, including the State Police, a Community Emergency Response Team approved by the New Jersey Office of Emergency Management, or a correctional facility, or a basic or advanced medical technician of a first aid or rescue squad, or any other nurse, basic or advanced medical technician responding to a catastrophic incident and directly involved and in contact with the public during such an incident, either as a volunteer, member of a Community Emergency Response Team or employed or directed by a health care facility."

Special Coverage Issues

- **Recreational or Sports Events:** A 1979 amendment to the Act substantially limited the type of recreational events that qualify for compensation. The Act specifically provides that the recreational or social activity must be a regular incident of employment, and produce a benefit to the employer beyond improvement in employee health or morale. For example, a volunteer firefighter would not be eligible for workers' compensation if injured at a baseball game unless the game was a fundraiser for the Department. [39]
- **Horseplay:** The Act specifically provides coverage for employees who did not instigate or take part in the horseplay. [40] Even the instigating party is covered under some circumstances if the horsing around was neither extensive nor serious. [41]

- **Intoxication:** Under the Act, an employee cannot collect if the accident was caused **solely** by the employee's intoxication.[42] As a practical matter, the courts almost always find at least one other cause so that this provision is rarely enforced.
- **Hernias:** The Act requires that claimants report hernias within 48-hours after the occurrence, excluding weekends or holidays.[43] This limitation only applies to inguinal hernias.[44]

Benefits Available to Injured Workers

- **Necessary Medical Care:** Workers' Compensation law allows the employer (or the employer's insurer) to contract with a managed care organization to provide medical treatment. This is a critical control to prevent abuse.[45]
- **Temporary Disability Payments:** Employees "off" from work receive compensation in the amount of 70% of the employee's earnings up to the state-average weekly wage, which is established annually by the Workers' Compensation Bureau. There is a seven-day waiting period before becoming eligible, but once this is satisfied the injured employee is paid for the waiting period.[46] This benefit is not subject to federal and state income or social security taxes.

  Under the law, temporary disability benefits stop when the doctor certifies that the employee has reached "maximum medical improvement" (MMI), even if the employee still cannot return to work. At this point, the employee is evaluated for an Indemnity award. If there is any doubt about the ability of an injured employee to perform a particular job, the employer will arrange for a functional capacity evaluation. **Temporary Disability Payments still terminate when the employee reaches MMI, even if the employee fails the examination.**

  There are special provisions concerning the weekly rates awarded to governmental volunteers.[47] Elected and appointed officials receive at least the minimum rates unless they actually receive salaries at a higher rate. Volunteer firefighters, first aid, rescue squad volunteers, ambulance drivers, special reserve or auxiliary police receive the maximum rate for benefits.

  In lieu of temporary disability benefits, many local government employees receive their full salaries for up to one year when they are "off" from work because of a job related injury or disability.[48] [49] The JIF reimburses the member an amount equal to what the injured employee would otherwise have received in workers' compensation temporary disability in these cases.
- **Indemnity Awards:** Employees also receive compensation for permanent disabilities, computed as a percentage of a body part or, in some cases, a percentage of the whole body. **The rating for an indemnity award has no bearing on the actual ability of an employee to return to work.** In many cases, an employee is awarded a substantial percentage of a certain body part and is still fully capable of passing a functional capacity evaluation, which determines the physical ability of a person to perform a work-related task safely with or without possible restrictions.

Special Claims Issues

- **Coordination of Workers' Compensation with State Pensions:** Either the workers' compensation or the pension is reduced, depending on the circumstances, to prevent "doubling up."
- **Coordination of Workers' Compensation with Social Security Disability:** Until age 62, the amount of the social security disability benefit or the workers' compensation benefit is reduced depending on the type of award. Social Security also recovers any payments it makes under Medicare for injuries and illnesses related to compensable claims from workers' compensation.
- **Workers' Compensation Courts:** The New Jersey Department of Labor administers the Act and employs judges to hear cases. Workers' compensation courts do not have juries. The regular court system only becomes involved when a decision is appealed.
- **Reopening Claims:** Under the Act, an injured worker is entitled to seek additional benefits within two years of the last compensation payment where the petitioner can show increased incapacity is causally related to the initial claim.
- **Section 20 Settlements:** A Section 20 settlement is often used where a claim is not clear cut. Section 20 settlements cannot be reopened unless there is fraud or misrepresentation. However, even if both parties agree, the judge is not compelled to approve the settlement. Section 20 settlements will only be granted by the court if there is an issue of jurisdiction, liability, causal relation, or dependency. Even with these restrictions, Section 20 is an important tool to resolve difficult cases.
- **Second Injury Fund:** Depending on the circumstances, the Second Injury Fund may pay a portion of an indemnity award if the employee was injured in an earlier accident. The fund was established to encourage employers to hire employees who were previously injured. The fund only participates in claims for total and permanent disability benefits where the injured worker is unable to return to gainful employment. It is the responsibility of the claims adjusters to make application for Second Injury Fund reimbursement.
- **Subrogation:** If another party caused the accident, both the injured employee and the employer may collect damages from this third "at fault" party. Under the Act, the employee has one year to file the lawsuit. After that, the employer can file. If the suit is successful, the employer, or the employer's insurer, usually receives two-thirds of the award up to the amount that was paid in worker's compensation. The remainder goes to the attorney and the employee.

Assisting the Claims Process

- **Use the most skilled physician.** New Jersey permits the employer, or the employer's insurer, to contract with a managed care organization to significantly reduce the cost of providing medical treatment. Management should interview the managed care coordinator and the claims adjuster to review the job descriptions and requirements of critical positions. They should also discuss claims procedures, including how to release employees back to work as soon as reasonable.

- **Maintain contact with the injured employee.** The worst thing that can happen is for an injured employee to sit at home without hearing from their supervisor. It is management's responsibility to periodically contact the injured worker and express support.

- **Return the employee to work as quickly as possible.** [50] Management should work with the treating physician and the managed care organization to identify what aspects of the job the employee is capable of doing before they reach MMI. Depending upon the circumstances, a transitional plan may include both specialized rehabilitation and transitional duty on the job. Some injured employees are not capable of immediately assuming full duties even after reaching MMI and may need time to build up to their full responsibilities. Additional rehabilitation may be required to get the employee back into shape after inactivity during the employee's disability period.
- **Include your attorney in the claims control discussion.** Some employees who have experienced multiple, or especially severe, injuries may not be able to continue in their regular jobs without substantial risk of reoccurrence. It may be in everyone's best long-term interest to assist the employee in obtaining a state disability pension in some of these cases.

Workers' Compensation Fraud

The adjuster should be informed of any suspicions of workers' compensation fraud so that an investigator can be assigned. While most public officials understand that employees may not be retaliated against for availing themselves of workers' compensation benefits, problems occasionally arise when the employer suspects dishonesty or exaggeration and allows this suspicion to affect treatment of the employee. The assertion of a fraudulent workers' compensation claim is not a protected activity and is potentially subject to criminal prosecution. Suspicion of fraud is vastly different from a judicial determination or even compelling evidence of fraud.

Suspicion is not sufficient to support a termination or any other adverse employment action. Work collaboratively with the workers' compensation adjuster to pursue any evidence of fraud, but do not take action against the employee prematurely based on suspicions, no matter how strong they may be.

At the same time, the filing of a workers' compensation claim does not immunize an employee from adverse employment action for other legitimate reasons. The primary defense to a workers' compensation retaliation claim is similar to the primary defense to all employment practices claims: the employer would have made the same move notwithstanding the employee's engagement in protected activity. As with all contemplated personnel decisions potentially affecting employees with protected status, you should consult with your employment attorney to vet those proposed actions prior to implementation.

Selected Case Law

Kossack v. Bloomfield (1960) [51]

Facts: A police officer was injured at home while cleaning his service revolver. There was no provision in the department's policies that specified where or when officers were to maintain their revolvers.

Decision: The court ruled that the petitioner was covered because he had a duty to keep the service revolver clean and serviceable, and "was unquestionably fulfilling the duties of office."

Comment: For the same reason, police departments are often held liable for injuries to other people from service revolvers that are accidentally discharged when an officer is at home.

Perry v. State Police (1998) [52]

Facts: A state police officer was required to use a state car to report to work. The morning after a winter storm, she slipped while shoveling snow away from the car.

Decision: The petitioner was denied workers' compensation because she was simply traveling to her normal place of work, was not responding to an emergency and her activities would have been the same if she was using her own vehicle instead of a state vehicle.

Comment: There is no coverage under workers' compensation just because the employee was injured while using an employer-owned vehicle unless the employee is actually "on-duty."

Mabee v. Borden (1998) [53]

Facts: The employer was having difficulty with a labeling machine and installed a bypass switch so that the machine could be operated without a guard. An injured employee who received workers' compensation also sued the employer, arguing that the employer's actions were an intentional wrong, and therefore, the employee was not barred from suing the employer.

Decision: The court decided that the employee's suit was not barred by the workers' compensation sole recourse rule because the employer installed the bypass switch and created the "virtual certainty" of an injury. The court also ruled that the legislature intended such exceptions be rare and fact sensitive.

Crank v. Palermo (1999) [54]

Facts: An authority commissioner was injured in an auto accident while in an authority-owned vehicle as a passenger. She was on authority business but argued that she was not an employee because she was not paid. Therefore, she argued that she could sue the authority for the negligence of the authority employed driver.

Decision: The court ruled that she was an employee for purposes of workers' compensation under the special provisions of the law. Therefore, the workers' compensation sole recourse rule barred the commissioner from suing the authority.

Peterson v. Alpine (2001) [55]

Facts: An "off-duty" police officer was injured while directing traffic at a Bell Atlantic worksite. He filed for workers' compensation from the town, which argued that Bell should pay the claim.

Decision: The court ordered both the town and Bell Atlantic to split the workers' compensation because the officer was hired by the utility through the town.

Comment: In situations like this, the courts look at whose interests are served by the employment. [56] Clearly, Bell Atlantic benefited from the officer's work and paid the town for the officer's services, even if the utility did not exercise direct control.

Capano v. Bound Brook Relief Fire Co. (2001) [57]

Facts: A 93-year-old lifelong member of a volunteer fire department fell while putting a log into a fireplace at the firehouse.

Decision: The court ruled that the firefighter was entitled to medical coverage for a hip replacement under workers' compensation that otherwise would have been paid by Medicare. The firefighter was also awarded temporary disability for lost income, even though he was long retired.

Comment: The court's opinion invited the legislature to correct the overly broad statutory language that resulted in this decision. To date, the legislature has not taken up this issue.

Jump v. Vendor (2003) [58]

Facts: A municipal water department operator stopped along his route to pick up his personal mail and was injured at the post office.

Decision: The court denied his workers' compensation claim because going to the post office on personal business was deemed as more than a minor deviation.

Wasik v. Bergenfield (2003) [59]

Facts: The petitioner engaged in horseplay with another sanitation worker, who became offended and struck the petitioner.

Decision: The court found that the petitioner's actions were neither extensive nor serious and that the other employee overreacted. Therefore, the petitioner was entitled to workers' compensation even though he was the instigator of the sequence of events that resulted in the altercation.

Lindquist v. Jersey City (2003) [60]

Facts: A career firefighter who was a heavy smoker applied for workers' compensation when diagnosed with emphysema.

Decision: The court ruled that he was entitled to compensation even though he was not able to clearly establish causation. The court wrote, "We reemphasize that it is not necessary for the firefighter to prove that the firefighting was the most significant cause of his disease. Rather, he need only show that his employment exposure contributed in a material degree to the development of his emphysema."

Minter v. Mattson (2018) [61]

Facts: The town told an employee that it was critical to come to work during a heavy snowstorm. The employee was injured in a vehicle accident during the commute.

Decision: While workers' compensation coverage does not usually begin until the employee reaches the workplace, the "going and coming" limitation does not apply if the employee is required to travel in dangerous conditions.

Martin v. Newark Public Schools (2019) [62]

Facts: The employee injured his back in an employment-related auto accident and was prescribed an opioid to relieve pain. After six years, the employer refused to continue paying for the opioid, arguing that the prescription was palliative and was not helping improve the patient's functioning.

Decision: The court ruled that an employer does not need to pay for pain relievers indefinitely and there may be a point that the pain or disability experienced by the worker is insufficient to warrant the expense of active treatment.

Hager v. M&K Construction (2020) [63]

Facts: A construction worker suffered a serious back injury in 2001 and went through years of treatment. In 2016, a pain specialist recommended medical marijuana. The insurer argued that this was not appropriate treatment because marijuana is an illegal substance under federal law.

Decision: The court ruled that the employer is required to pay for medical marijuana when prescribed in a workers' compensation case. Since the employer is not required to process, manufacture or distribute marijuana, there is no conflict between the Federal Controlled Substances Act and New Jersey's Medical Marijuana Law.

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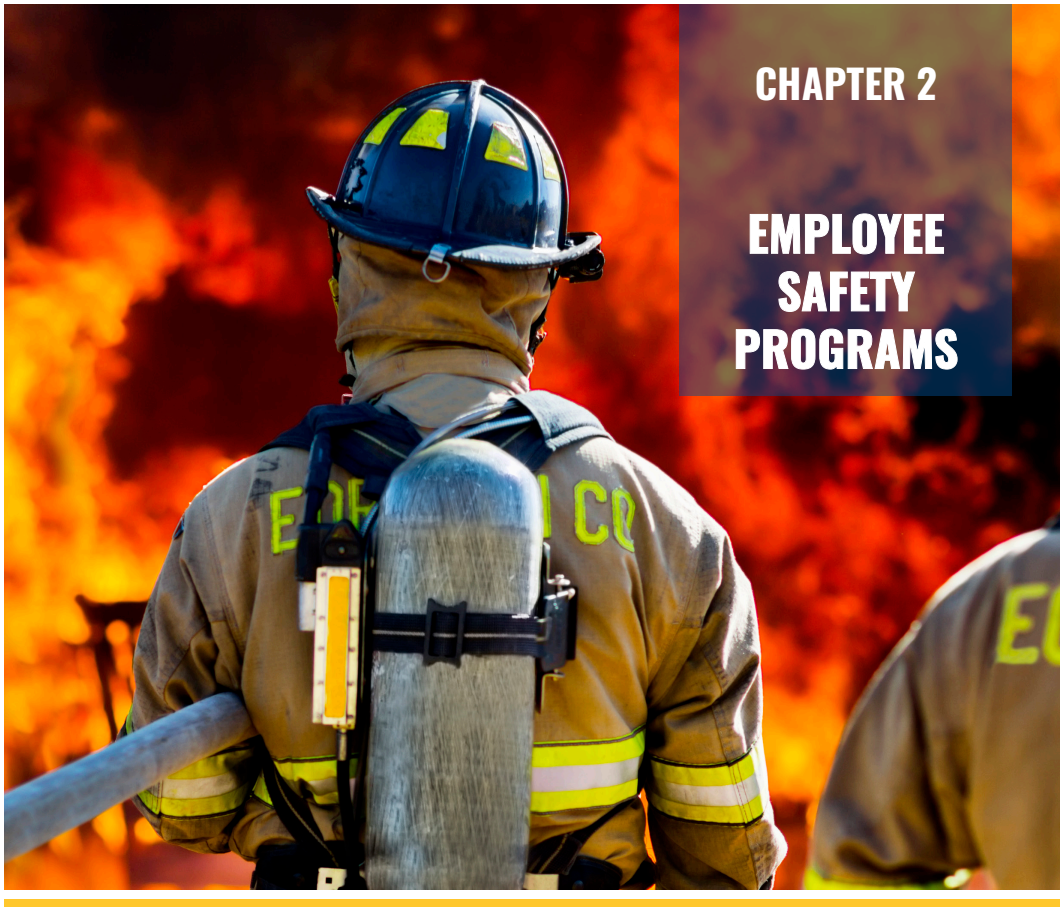
[20] Dudley v. Victor Lynn Lines (1960)
[21] Geaney, John, New Jersey Workers' Compensation Manual, 2019, p.2
[22] Laidlow v. Hariton Machine Company (2002)
[23] Cierpik v. Manasquan (1949) and Martin v. Pollard (1991)
[24] DaSilva v. JDDM Enterprises (2018)
[25] Stevens v. Allamuchy Township (1944)
[26] *N.J.S.A. 34:15-43*
[27] *N.J.S.A. 59:7A-1*
[28] Joseph v. Monmouth County (2015)
[29] Chisholm v. Ocean County (1989)
[30] Ward v. Davidowitz (1983)
[31] Nemchick v. Thatcher (1985)
[32] *N.J.S.A. 34:15-31*
[33] Brunell v. Wildwood Crest Police Department (2003)
[34] Raimondi v. Morris County Park Police (2013)
[35] Fiore v. Consolidated Freightways (1995)
[36] Dietrich v. Toms River BOE (1996)
[37] Lindquist v. Jersey City (2003)
[38] A-1741 Thomas P. Canzanella Twenty First Century First Responders Protection Act
[39] Dowson v. Lodi (1986)
[40] *N.J.S.A. 34:15-7.1*
[41] Wasik v. Bergenfield (2003)
[42] *N.J.S.A 34:15-7*
[43] *N.J.S.A. 35:15-12(c)(23)*
[44] Potter v. Jersey City (2012)
[45] Geaney, John, New Jersey Workers' Compensation Manual, 2019, p.175
[46] A 2002 amendment to N.J.S.A. 34:15-75 provides that emergency workers are not subject to the minimum seven-day waiting period.
[47] *N.J.S.A. 34:15-43*
[48] *N.J.S.A. 11A:6-8* and *18A:30-2.1*
[49] In 2010, the state eliminated a similar program for its workers who now only receive workers' compensation. However, in 2017 the legislature reinstated this program for corrections officers who are assaulted by inmates.
[50] According to a report authored by the American College of Occupational and Environmental Medicine, unnecessary, prolonged work absence can cause significant harm to a worker's well-being. Workers who are on extended disability often lose social relationships with co-workers, as well as the self-respect and self-esteem that comes from earning a living. For many workers, their job is part of their identity, and being kept away by illness or injury is a very stressful experience. By allowing a more accelerated return to work and more significant support during recovery, transitional duty programs can help employees reduce the stress and disruption that injuries or illness cause in their daily lives, leading to better recovery.
[51] 63 N.J. Super. 332 (Law Div. 1960)
[52] 296 N.J. Super. 158 (App. Div. 1996) aff'd, 153 N.J. 249 (1998)
[53] 316 N.J. Super. 218 (App. Div. 1998)
[54] A-5050-98T3
[55] A-5205-99T1
[56] Domanoski v. Fanwood (1989)
[57] 356 N.J. Super. 87 (App. Div. 2002), certify. Denied, 175 N.J. 550 (2003)
[58] 351 N.J. Super.44 (App. Div. 202) aff'd
[59] A-794-02T3 (App. Div. 2003)
[60] 175 N.J.244 (2003)
[61] A-1916-15T4A (App. Div. 2018)
[62] A-0338-18T4 (App. Div. 2019)
[63] A-0102-18T3 (App. Div. 2020)



CHAPTER 2

EMPLOYEE SAFETY PROGRAMS

Local government is responsible for many of the more hazardous functions in our communities. It is sobering to realize that the typical police officer, firefighter or DPW worker has a higher chance of being injured on the job than an underground mining or construction worker.

Management establishes priorities and sets an example. Through consistent & effective safety programs they can dramatically reduce accident rates. Since 1991, JIF members have reduced their accident rates by an average of over 65%.

Modern employee safety programs date back to the 1920s when workers' compensation insurance became widespread. In 1931, while Superintendent of Engineering for Traveler's Insurance Company, Herbert Heinrich (1886 – 1962) wrote his groundbreaking thesis that the frequency of accidents was directly related to the frequency of unsafe acts and unsafe conditions. He concluded that over time, the accident rate will drop proportionally if management addresses these issues. [64]

President Nixon signed the Occupational Safety and Health Act (OSHA) in 1970 to assure safe and healthy working conditions. Since then, the employee accident rate has dropped 53%. [65] OSHA codified safety standards that had been adopted by various national organizations over the preceding decades into law, hired inspectors and used its authority to fine violators.

Governor Kean signed the New Jersey Public Employees Occupational Safety and Health Act (PEOSHA) in 1985, giving the Department of Labor and Workforce Development responsibility for on the job safety in the governmental sector.[66] New Jersey PEOSH standards are more stringent than federal standards in some areas. PEOSH also has inspectors and conducts training programs.

Management Strategies That Impact Safety Records:

- **Monitor safety performance.** Managers communicate their priorities by what they monitor. Employers experience dramatically fewer accidents when top management closely follows the safety record experience and accident rate. The risk management program should be on the governing body's monthly workshop agenda. When senior officials are aware of the safety performance, they are far more likely to provide the necessary support to the safety program.
- **Empower employee involvement in the safety program.** Strong management support of the Safety Committee is essential, but safety cannot be solely "top-down" and must include the grassroots. Communicate to the workforce that everyone has the right to question something that appears unsafe, and that everyone must look out for each other. This includes the right to stop an operation if something does not seem right.
- **Require all personnel to complete a safety orientation and periodic refresher training.** Organizations where all personnel are up to date on their safety training average almost 50% fewer reportable accidents. Go to NJMEL.org for complete details on the member training program offered.
- **Discuss safety with employees at the start of each shift.** Organizations where supervisors and crew leaders discuss safety with their associates each morning average less than half the frequency of accidents as those that do not. Managers and supervisors have the responsibility to ensure that each operation is properly planned and to communicate the critical safety procedures required for that day's activities to every employee.
- **Participate in accident investigations.** "Participate" means active involvement, not merely reading the reports. Too often, management participation is the missing element in accident investigations. Someone from management should go to the scene and "drill-down" to identify the real causes.
- **Monitor PEOSHA compliance.** The New Jersey Department of Labor and Workforce Development enforces compliance with PEOSHA regulations. Your JIF or insurer should periodically inspect local government facilities and audit for compliance. The Safety Committee should include those reports in the monthly risk management report to the governing body.

Accident Facts

Municipal Accidents by Department

- Public Works 46%
- Police 34%
- Fire 9%
- EMS 4%
- Administration 3%
- Other 4%

Industry Rates per 100 Employees

Industry	LT Cases
Insurance & Finance	0.3
JIF Members	1.8
Wholesale, Retail Trade	2.3
Manufacturing	2.6
Mining	2.8
Construction	3.1
Transportation	4.0
State Government	4.3
Local Government	4.3
All Employers	2.3

Police Department Accidents

- Lifting 25%
- Motor Vehicle 17%
- Slips & Falls 15%
- Assaults 12%
- Other 31%

Fire Department Fatalities

- Heart Attack 43%
- Trauma 32%
- Asphyxiation 10%
- Burns 7%
- Other 8%

Public Works Employee Accidents

- Trash Collection 38%
- Streets 24%
- Buildings & Grounds 16%
- Vehicle Repair 9%
- Water & Sewer 7%
- Other 6%

Utility & DPW Employee Accidents

- Lifting 48%
- Slips & Fall 18%
- Struck By10%
- Other 24%

What is a Local Government Safety Committee?

The Safety Committee plans and implements the risk control program. It should be collaborative and include the risk management consultant and representatives from management, collective bargaining units and non-union employees.

Research has shown that organizations with a higher percentage of its workforce on Safety Committees have lower injury and illness rates.[70] Front-line workers have the most experience with how a task is performed and can help identify hazards that others may overlook. An effective Safety Committee taps into this knowledge "from the neck up." To encourage broader participation, large organizations often create subcommittees by department.

Safety Committees with strong and visible upper management support are more likely to make a meaningful impact on workplace safety. An effective Committee Chair must facilitate the meeting without dominating it or allowing someone else to do so. The Chair should also focus on encouraging participation among all members. Establish basic ground rules to ensure meetings do not get out of control and use detailed agendas to make meetings more effective.

Training

A major responsibility of the Safety Committee is to monitor attendance of both classroom and online training programs. The most frequently used courses are:

Classroom Courses	**Online Courses**
Bloodborne Pathogens	Camp Counselors
Defensive Driving	Anti-Harassment
Violence Prevention	Blood Borne Pathogens
HazCom	HazCom
Hearing Conservation	Cyber Security
Fire Extinguisher	Safe Patient Lifting
Commercial Driver's License	Fire Safety
Snow Plow	Driving in Emergencies
Flagger/Work Zone	Land Use Liability
Lock Out/Tag Out	Avoid Back Pain

Common Exposures

The most common accident types for all local governmental employees are body mechanics, such as lifting, slips & falls and motor vehicles. All employees should complete the basic new employee orientation, available in the MEL's online learning management system. There are specific safety training programs for lifting and slips & falls, including a special program for first responders who are exposed to difficult situations. Fleet safety programs cover a variety of issues, including proper vehicle use, maintenance, driver selection and safety. These are important for local governments that often have large vehicle fleets with an average of two vehicles for every three employees.

Public Works

Work on roads and around heavy equipment is especially dangerous, and while police officers and firefighters receive extensive training from county academies, there are no county academies for Department of Public Works (DPW) employees. The MEL Safety Institute provides extensive public works training to fill this gap. Some of this training is online, however, classroom instruction and onsite demonstration is especially important because of the serious consequences of safety lapses.

Many communities have a tradition that newly elected officials spend part of their orientation with the DPW to understand the department. DPW responsibilities are varied and highly seasonal, including the maintenance of roads, athletic fields and landscaping during the spring and summer, collecting leaves in the fall and snow removal during the winter. Some are also responsible for garbage collection and, in many towns, operate water and electric utilities.

With over 100 Public Works employees killed in work zone accidents nationwide each year, all DPW personnel must receive periodic training concerning work zones and the Manual for Uniform Traffic Control Devices. Issues that lead to fatal accidents include exposure to "crush" accidents, both while in the community and in the garage or DPW yard, trenching and confined space entry. It is also critical that each DPW maintains an orderly garage and yard. View the MEL produced award-winning video, "Don't Get Caught in the Crush Zone," at NJMEL.org.

Police

Great strides have been made to improve the safety of police officers. The number of police officers killed in the line-of-duty peaked at 278 in 1974. By 2019, the figure had been reduced to 106, with 55 feloniously killed while 51 died in accidents. [71]

A third of the safety professionals retained by the MEL are retired police command officers who have a unique understanding of the specific safety issues within police agencies and have the ability to relate to their peers. The MEL conducts risk management seminars around the state for almost 1000 police command officers every two years. The MEL is also working closely with the New Jersey State Association of Chiefs of Police (NJSACOP) to implement the national "Below 100" program in New Jersey. The objective of this program is to reduce annual line-of-duty police fatalities under 100. This effort involves extensive training on the five tenants of law enforcement safety:

- Wear your belt.
- Wear your vest.
- Watch your speed.
- WIN – What is Important Now?
- Remember: Complacency Kills!

Police Accreditation is another strategy to reduce law enforcement accidents. Accreditation begins with the agency's adoption of a clear statement of professional objectives followed by the evaluation of its policies and procedures. Model policies are available through the NJSACOP. The agency must also evaluate whether its training program is current and documented. When the procedures are in place, a team of experienced command officers verifies that the standards have been implemented. Several organizations, including the NJSACOP, provide accreditation programs, and the MEL offers a premium discount to communities that have accredited police agencies.

School Crossing Guards

Half of our children walked to school forty years ago, compared to only 15% today. As a result, school zones are clogged with more traffic than they were designed to handle. This congestion is often compounded by motorists who are in a hurry when they drop off or pick up their children. Because of these changes, being a school crossing guard has become one of the most dangerous occupations in local government.

In 2006, the MEL worked with the NJSACOP to produce a comprehensive safety training program for crossing guards, including the videos, "Street Smart is Street Safe" and "School Zone, Danger Zone". Another video, "Walk the Walk," discusses how communities can create a comprehensive pedestrian safety program, including walking routes to school. All of these videos can be streamed at NJMEL.org. Rutgers University has since taken responsibility for developing crossing guard training, and the MEL is a prime sponsor of their program.

Fire Departments

Heart Attacks: In 2007, the National Institute for Occupational Safety and Health (NIOSH) issued an alert that sudden cardiac death is the most common cause of "on-duty" firefighter fatalities. The report concluded that 39% of fatalities involving career firefighters and 50% of those involving volunteers were due to sudden cardiac death. The higher incidence among volunteers is due to the fact that they tend to be older. Of the heart attacks, 43% involved firefighters over age 55, and one-sixth involved firefighters over 65.

Heart attacks are the number one cause of death in the United States, striking at least 600,000 Americans each year. In half of the cases, the first symptom is death. In a recent New England Journal of Medicine study, Dr. Stefanos Kates of Harvard University concluded that,

> "Firefighters do not have a higher risk of heart disease compared to the general population, but the sudden exertion of their work can trigger a heart attack in the same way shoveling snow can lead to a heart attack in someone else. Firefighters may begin their careers in better shape than others, but as they grow older they may acquire risk factors, such as high blood pressure and cholesterol as well as weight gain."

In addition to a comprehensive safety training program, every department should offer ongoing heart screening. A model program is in the resource section at the end of this manual.

Cancer: Compared to the general U.S. population, firefighters are 9% more likely to be diagnosed with, and 14% more likely to die from, cancer.[72] Firefighters have significantly higher risks of respiratory (lung and mesothelioma), gastro-intestinal and kidney cancer. Specifically, they are twice as likely to have mesothelioma and have a 129% increased risk of dying from it. Firefighters also have a 62% higher risk of having esophageal cancer.

In 2018, the International Association of Fire Chiefs' Volunteer & Combination Officers Section (VCOS) and the National Volunteer Fire Council (NVFC) released the "Lavender Ribbon Report" that outlines 11 actions that fire departments should take to reduce cancer-related risks.

- Wear full personal protective equipment (PPE), including self-contained breathing apparatus (SCBA), during the entire incident, salvage and overhaul.
- All entry-certified personnel should be provided with a second hood so that they always have time to wash their contaminated hood and a spare available for calls.
- After leaving atmospheres that are immediately dangerous to life and health (IDLH), stay on air and immediately begin gross decontamination of PPE using soap and water. Place PPE in a sealed bag and place the bag in an exterior compartment of the apparatus, or store in a large storage tote in personally owned vehicles.
- Immediately use wipes to remove as much soot as possible from exposed areas like the neck, face, arms and hands. Remember to always keep wipes in all apparatus.
- Change clothes as soon as possible after an event. Wash clothes immediately or store them in a trash bag until washing is available.
- Shower within the hour or ASAP.
- PPE should be stored in the apparatus floor and not in living quarters.
- Decontaminate and regularly clean the apparatus seats, SCBA and interior with soap and water or wipes, especially after incidents where personnel were exposed to products of combustion.
- Firefighters should be strongly encouraged to get annual physical examinations.
- Firefighters should never use tobacco.
- Fully document all fire or chemical exposures in the incident and personal reports.

Office

Approximately one percent of all office employees suffer a disabling on the job accident each year. While this is only a quarter of the rate for other occupations, it is still serious enough that PEOSHA requires that every office worker must be provided safety training. The MEL has a training program in its online learning management system that meets this requirement.

Almost half of office-related accidents involve slips and falls. The MEL's video, "Smart Moves to Avoid Falling Down," addresses this issue.

Administrative and managerial employees are also injured in vehicle accidents while traveling to appointments. All personnel who operate either employer or employee vehicles on business must be included in the vehicle safety program, including driver's license checks and periodic training.

PEOSHA Compliance

All employers have a general duty to maintain a safe and healthy work environment. The New Jersey Public Employer Occupational Safety and Health Administration (PEOSH) enforces Federal OSHA Standards for public entities, and in some cases, adopts more stringent standards. PEOSH has the power to inspect facilities and issue fines where it determines that its standards have been violated. While many inspections are random, PEOSH also responds without notice to employee complaints. All employee bulletin boards must have a notice that explains employee rights under PEOSHA.

The most common citations are failure to (a) maintain the required records, (b) adopt written safety policies, and (c) provide adequate training. Local governments must pay special attention to confined space entry requirements, procedures to "Lock Out" machinery and vehicles while being repaired, temporary traffic control at worksites and emergency incidents, work in excavations and work on elevated surfaces. Other major regulations concern indoor air quality, bloodborne pathogens, and the proper control of chemical hazards.

Reporting Requirements: PEOSHA requires that public employers report fatalities to the state by contacting the 24-hour hotline (800) 624-1644 or the 24-hour fax line (609) 292-3749 within eight-hours of the occurrence. Employers must also report work-related hospitalizations, amputations or loss of an eye within 24-hours. Employers are required to maintain a log of work-related injuries and illnesses, with the summary log to be completed by February 1st and posted on the employee bulletin board in each department for three months, until April 30th.

Written Safety Plans: A strong set of written policies and procedures is the foundation of a safety culture. These policies must be included in employee training programs, and copies made available. The MEL maintains model policies that can be downloaded at NJMEL.org. Specifically:

- Exposure Control (Bloodborne Pathogens)
- Hazard Communication and New Jersey Right to Know
- Fire Prevention
- Emergency Action Plan
- Personal Protective Equipment (PPE) and Job Hazard Assessments
- Respiratory Protection
- Indoor Air Quality
- Control of Hazardous Energy (Lock Out / Tag Out)
- Reporting and Recording of Occupational Injuries
- Confined Space Entry Permit System

Training: These written policies must form the basis of training programs that focus on each worker's specific exposures. Local governmental employees do not work in a controlled and static environment such as a factory. Even the best-written policies cannot anticipate all of the situations faced by workers.

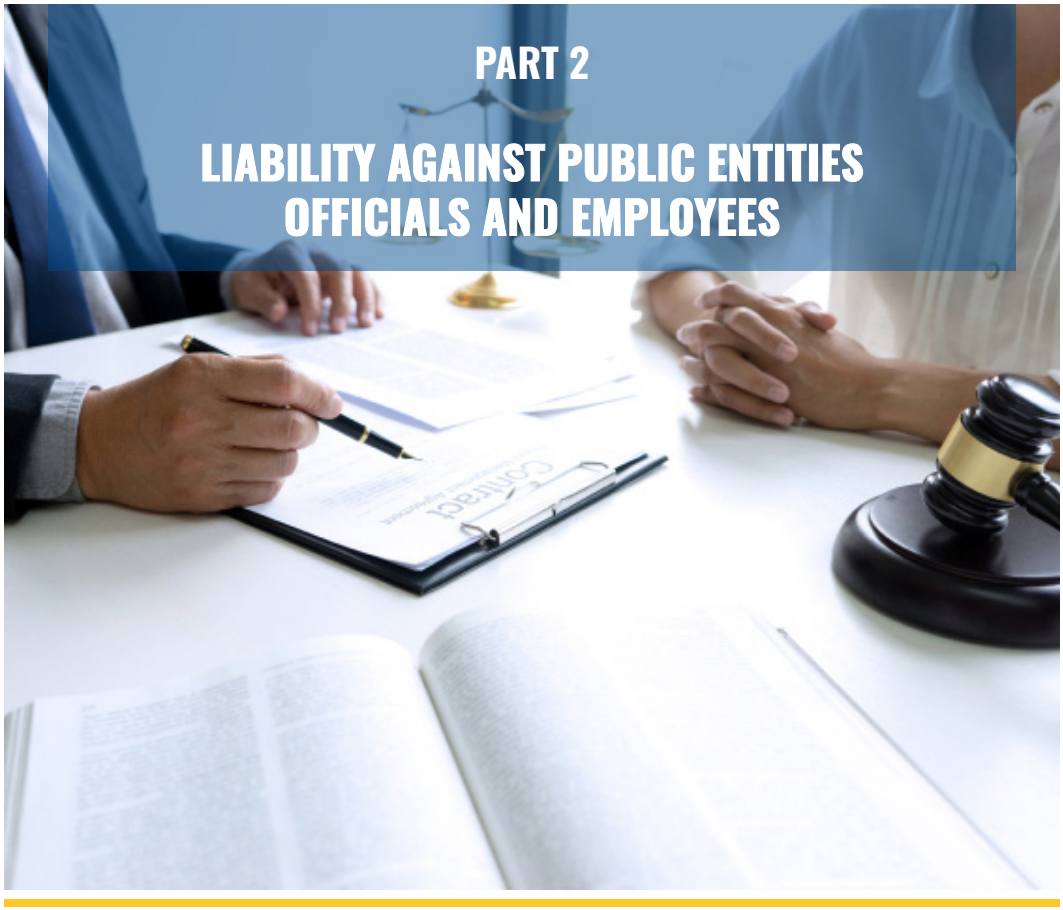
Two training concepts are critical for effective training. First, "chunk learning," or short and targeted daily safety messages about that day's work, is especially effective since adults learn best when the information can be immediately applied. The second concept is "teambuilding," where information can be communicated up and down the organization. Leaders must encourage employees to share insights and concerns with their supervisors and each other.

A training plan should start with meeting the minimum regulatory standards. PEOSH emphasizes that training must be provided on all significant equipment and vehicles, and documentation must be available for PEOSH inspectors.

Conclusion

The most critical thing any official can do is to place the risk management program on the discussion agenda each month and request a management report on the program's status. The management team and workforce will adjust their priorities based on what the governing body decides to monitor.

[64] Heinrich HW, Industrial Accident Prevention, A Scientific Approach, 1931
[65] National Safety Council Injury Facts, https://injuryfacts.nsc.org/
[66] *N.J.S.A.34:6A-25 et seq.*
[67] Many JIFs compute member accident frequencies each month so that members can benchmark their performance.
This report should be periodically distributed to the member's governing body.
[68] The employee orientation available on the MEL web site emphasizes this message.
[69] In 2018, the MEL conducted over 1,100 training classes attended by over 24,000 member employees. Another 29,000 employees completed online training programs written and produced by the MEL's safety consultant. All of this training is available to members without additional charge through the MEL Safety Institute at NJMEL.org.
[70] New Solutions (Vol. 18, No. 4)
[71] Federal Bureau of Investigation, Law Enforcement Officers Killed and Assaulted 2018
[72] Cancer in the fire service: what we should know + what we should do, VFIS, October 10, 2019



PART 2

LIABILITY AGAINST PUBLIC ENTITIES OFFICIALS AND EMPLOYEES

Every local government should also have a Litigation Risk Committee to monitor the status of lawsuits and put plans into place to reduce potential liabilities. It should be comprised of the Mayor or authority chair, manager or executive director, the local unit's attorney, senior managers and the risk management consultant.

CHAPTER 3

TORT CLAIMS ACT (TITLE 59)

Much of the material in this chapter was contributed by the late John S. Fitzpatrick, who drafted portions of *Title 59* while he was New Jersey Deputy Attorney General (1969-1976). He later served as a senior member of the MEL's defense panel.

The decisions made by local government impact everything that happens in a community. Almost any accident could result in a lawsuit against local government in the absence of some reasonable limitation. While private entities have the ability to limit the scope of their activities, government does not. [73]

Government was protected by sovereign immunity [74] until 1959 when the New Jersey Supreme Court ruled that governmental employees could be sued for failure to perform ministerial duties but not for discretionary activities. [75] The court struggled to determine what discretionary activities should have immunity over the next 11 years, ultimately inviting the legislature to adopt a Tort Claims Act. [76] The resulting *Title 59* is based on the California Tort Statute and incorporates the concept of "modified governmental immunity."

Adopted in 1972, *NJSA Title 59* provides governmental entities and employees with immunity to civil suit unless a separate law establishes liability.

- Approximately 60% of liability claims against government entities arise out of common accidents and are filed under *Title 59* (Chapter 3).
- Another 30% are civil rights cases filed under various federal and state civil rights and employment practices laws (Chapter 4, 5, 6, 16 and 17).
- The remaining 10% involve environmental issues brought under various "Super Fund" laws (Chapter 10).

Immunities

Discretionary Immunity: Under *Section 2 of Title 59*, all New Jersey public entities and employees enjoy broad immunity for the exercise of governmental discretion. Discretion begins with legislative powers vested in the State legislature, county freeholders, municipal governing bodies and Boards of Education. Specifically:

> "A public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature." [77]

For example, suppose (1) that traffic increased in an area after it was rezoned for high-density housing, (2) the increased traffic caused an increase of pedestrian accidents, and (3) one of the injured pedestrians alleged that the accident would not have occurred but for the rezoning. The town is still protected from a civil suit because zoning authority is discretionary and eligible for legislative immunity.

Legislative immunity will not protect the town if the council violates civil rights when it exercises its legislative powers. For example, suppose (1) a minority contractor was the low bidder to construct a new firehouse, but (2) the bids were rejected, and (3) the contract was then awarded to a local contractor after several other rounds of bidding. Legislative immunity would not protect the council from a suit alleging that the minority contractor's rights were violated.

All local officials should have a basic understanding of civil rights laws along with employment practices, land use and ethics. All of these topics are discussed in later chapters.

Section 3 of Title 59 extends discretionary immunity to officials and employees, including special immunities for:

- Good faith enforcement or failure to enforce any law. [78]
- Issuance, denial, suspension or revocation of permits or orders, or the failure to do so. [79]
- Failure to inspect, or negligent inspection of property. [80]

Without these immunities, public entities and their employees would continually be sued for accidents happening in their town based on the theory that these accidents would not have occurred if the local government enforced its laws more effectively. However, there is an important exception.

> "Nothing in the act shall exonerate a public employee from liability if it is established that his conduct was outside of the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct." [81]

Therefore, it is possible that the public entity is immune under *Title 59*, but individual officials or employees are not immune. Even the public entity's immunity can be nullified by Federal and State civil rights laws that supersede *Title 59*. In one notorious case, a gay couple who lived next to a firehouse was harassed by firefighters while returning from dinner one night. The court ruled that while normally just the firefighters would be liable, the town was also responsible because this was a discrimination case. The jury awarded the couple $2.84 million. [82]

Recreational Immunity:

> "A public entity is not liable for failure to provide supervision of public recreational facilities; provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition..." [83]

While there is no obligation to provide supervision, a municipality, employee or even a volunteer can be sued for negligent supervision when it is provided. Importantly, the law provides a special immunity to volunteer athletic coaches, managers or officials for non-profit sports teams if they have completed a one-time safety orientation course, usually provided by Rutgers University. [84] Towns should require all coaches, referees and other officials to submit certificates verifying course completion and maintain these records.

Law Enforcement Immunity: When drafting *Title 59* in 1972, the Attorney General's task force recognized that public entities could be overwhelmed by lawsuits without carefully written law enforcement immunities. One such immunity is that there is no requirement that a municipality maintains a police department. This prevents crime victims from alleging that the crime would not have occurred had the police been better staffed and funded. [85]

In recent years, there has been increased public scrutiny of police "use of force" and police interaction with minority citizens. Unlike other states, the New Jersey Attorney General has the authority to establish standards by regulation without legislative approval. As a result, New Jersey has been acknowledged as a leader in adopting police reforms. Police immunity is also more limited than in other states. Specifically:

> "A public employee is not liable if he acts in good faith in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment." [86]

Notice that this immunity is not limited to police and protects all government employees involved in law enforcement, including municipal clerks, construction code officials, fire inspectors and anyone else who enforces laws.

To be eligible for immunity, a law enforcement official must act "in good faith," which means "honesty of purpose and integrity of conduct without knowledge, either actual or sufficient to demand inquiry, that the conduct is wrong." [87] Conduct will be considered to be " in good faith" if it is objectively reasonable. [88] Even if the conduct fails to meet this standard, public employees can still benefit from the good faith immunity if they can show "subjective good faith" at trial, [89] which means that they honestly believed they acted in accordance with the law.

Hypothetically, let's say an officer witnesses someone speeding but decides not to make the traffic stop. Two blocks later, the motorist runs a red light and has an accident. The officer has immunity in this situation as long as there is no bad faith. If the officer knew that the speeding motorist was an "off-duty" police officer, however, a jury could easily decide that the officer's failure to stop a fellow officer was bad faith.

The immunity does not apply to liability for false arrest or false imprisonment. Officers must have "probable cause" and cannot violate someone's civil rights or use excessive force. **Officers also have an affirmative duty to intervene if a fellow officer is violating someone's civil rights or using excessive force.** [90]

In recent years, many police agencies have successfully completed an accreditation process to improve their policies, procedures, and related training. Several accreditation programs also provide model policies to make the process easier. Many JIFs give a premium discount to accredited departments.

Many police liability cases are auto accidents. Under *Title 59*, police officers have immunity when responding to an emergency so long as they are not driving in a reckless fashion.[91] Even with this immunity, it is especially important to avoid high-speeds for relatively routine calls such as burglar alarms. Police agencies are now curtailing high speed pursuits because of the danger to both the public and the officer.

Accidents on Public Property

The most frequently litigated area of *Title 59* concerns accidents on public property. To prevail, a plaintiff must establish all of the following:

- The claimant was using public property with reasonable care for its intended purpose.
- The public property was in a dangerous condition.
- The public entity had actual or constructive notice of the dangerous condition that caused the accident.
- The action or inaction of the public entity or employee was palpably unreasonable. The courts have defined palpably unreasonable to mean "Actions or inactions that no prudent person would approve." [92]

Under *Title 59*, public entities are protected from civil suits for accidents on public property in the cases of:

Design Immunity: The Act provides a broad immunity for injuries resulting from a defective design of public property after an authorized government body has officially approved it. This immunity applies to any public project, but is especially important in relation to roads. Without it, the government would be sued every time someone alleged that an older road design contributed to a vehicle accident, as most streets were designed using standards that are not consistent with modern practice. Once design immunity is triggered, it remains in force even if safety standards subsequently change. [93]

The governmental entity must establish that the design was approved by the governing body or other appropriate authority before construction started and before any change orders were implemented to take advantage of the immunity. This should be done by resolution so that there is a permanent record of the action.

Scarce Resources: *Title 59* also recognizes that governments have limited resources and provides that:

> "A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether or not to utilize or apply existing resources...unless a court concludes that the determination of the public entity was palpably unreasonable." [94]

The legislature recognized that government does not have the resources to do everything that needs to be done. [95] Local governments should enact an orderly infrastructure repair and replacement program to take advantage of this immunity.

Sidewalks and Curbs: Most communities have miles of sidewalks and curbs, and it is not possible to repair every defect. Under legislative immunity, a community has no obligation to install these improvements but has a limited obligation to provide maintenance.

- **Residential Homeowners:** Under common law, homeowners have no legal responsibility to maintain sidewalks or clear snow in front of their property. Even if an ordinance requires homeowners to repair sidewalks or clear snow, the immunities still protect them from liability in the event of an accident. [96]
- **Commercial Properties:** Unlike homeowners, commercial properties can be held liable for accidents on the sidewalks in front of their establishments. Rental units are considered commercial properties.
- **Local Government:** Government enjoys common law snow and ice immunity [97] except where the government entity, such as a Housing Authority, owns rental property. [98] Local government may be held liable for accidents caused by sidewalk and curb defects in limited situations. For the government to be held liable, the injured party must show that the defect was known or should have been known and was serious enough that the failure to make a repair was "palpably unreasonable." Local government may also take advantage of the "scarce resources" immunity. If the governing body enacts a sidewalk repair program over time, the legislature meant for the town to have immunity during implementation. Municipalities may also minimize their exposure by establishing a Shade Tree Commission. [99]

Streets and Crosswalks: *Title 59* immunities almost eliminate lawsuits against public entities for pedestrian accidents except in situations where the injured person is struck by a government vehicle. The decision to establish a crosswalk is discretionary, and the design of the crosswalk is eligible for design immunity. Once established, a crosswalk must be maintained but is eligible for the same immunities as a sidewalk.

Cases involving potholes are also rare. In the winter, motorists must expect potholes to develop. Potholes fall under the same immunity protections as defects on sidewalks. The New Jersey Supreme Court admonished the lower courts that *Title 59* does not require counties and municipalities to establish what would amount to a roving pothole patrol. [100]

Unimproved Property: As a general principle, there is immunity for accidents caused by natural conditions, but not for accidents caused by man-made hazards. Specifically:

"Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." [101]

Do not use this immunity as an excuse to ignore hazards on unimproved property. Sometimes judges will not grant the immunity despite the hazard being naturally created. In one case, a couple was walking along a path through town-owned woods during a windstorm with gusts up to 50 MPH. A large branch came down from a tree, killing the woman. While the case should have been thrown out under unimproved property immunity, the judge ruled that the town should have posted a warning or closed the path.

Other Provisions

Fire Department and Ambulance Corps: There is a special immunity for fire departments and ambulance corps while *"rendering in good faith any such services."* Without this provision, the town would be sued after every fire claiming that the damage was more severe because the fire department failed to arrive fast enough or did an ineffective job. In rare occasions, first responders can be held responsible for conduct that is deemed "willful or wanton." [102]

State of Emergencies: The declaration of an emergency or the failure to do so is a legislative function and is entitled legislative immunity. [103] Special immunities also apply when the Governor declares a state of emergency, so long as the public entity and its officials, employees or volunteers acted in good faith. [104]

Verbal Threshold: To prevail under *Title 59*, the plaintiff must demonstrate both permanent "loss" of a body function and monetary losses of over $3,600. [105]

Collateral Source Rule: This provision reduces the amount of any award against local government by the amount the claimant can collect from other insurance. For example, you park your new car on the street and it is totaled by a town truck during a snow storm. If your car is covered by insurance, the maximum you can recover from the town is your deductible. [106]

Sewage Backups: No elected official wants to receive a call at 3:00 a.m. that sewage is backing up into a resident's basement. The town has no responsibility if the blockage is in the lateral between the street and the residence. The town may have responsibility under some circumstances if the blockage is in the main line and the town had notice of the problem, such as the blockage previously occurring with some frequency. You should know how your town responds to sewer back-ups. Most towns make arrangements with an emergency contractor who can be called to quickly clean-up the sewage. After that, the adjusters will sort out who is responsible to replace the damaged property.

Statute of Limitations: There are strict time limits to file claims and then institute a lawsuit under *Title 59*. Cases are barred every year because the attorney failed to file a notice of claim within 90 days, or a lawsuit within two years of the incident. [107] Under legislation enacted in 2019, the statute of limitations to file claims for sexual assault has been significantly expanded.

Punitive Damages: While barred in most *Title 59* cases,[108] punitive damages are permitted in civil rights, sexual molestation and environmental liability lawsuits. Under New Jersey law, punitive damages cannot be covered by insurance except in rare situations.[109]

Litigation Risk Committee

Every local government should have a Litigation Risk Committee to control legal exposures. The committee should consist of:

- Mayor or Authority Chair[110]
- Manager or Executive Director
- Local Unit's Attorney
- Risk Management Consultant (RMC)
- Other Department Heads depending upon the size of the local unit.

The Litigation Risk Committee must work collaboratively with the Safety Committee and should consider inviting the Safety Committee Chair to participate.

The Committee's responsibilities should include:

- **Litigation:** Monitor the status of all outstanding lawsuits.
- **Ordinances and Resolutions:** Periodically review all ordinances and resolutions to ensure they are consistent with the latest case law, and review all proposed ordinances to consider risk management issues.
- **Inspections:** Institute a system of regular inspections of all public property and monitor the results.
- **Reporting:** Adopt procedures for citizens to report hazards, log all reports and record corrective action. Many local governments have installed software that tracks reports of hazards and the actions taken to correct these defects. These records can be important when defending claims.
- **Capital Planning:** Plan a multi-year program to allocate scarce resources for the repair and replacement of critical infrastructure such as sidewalks, curbs and road resurfacing.
- **Employment Practices Risk Control:** Update the Employee Practices Risk Control Program every two years, including the Employment Practices Manual, the Employee Handbook and training for officials, managers and supervisors (See Chapter 4).
- **Americans with Disabilities Act (ADA):** Designate an ADA Coordinator to oversee compliance with Title II and investigate any complaints of inaccessibility (See Chapter 5).
- **Land Use:** Arrange to have all Planning and Zoning Board members trained to minimize land use liability (See Chapter 6).
- **Child Abuse:** Implement a comprehensive child abuse prevention program (See Chapter 7).
- **Insurance Coverage:** Review coverage issues with the Risk Management Consultant and review the insurance provisions of contracts with vendors (See Chapter 8).

- **Special Events and Use of Public Facilities:** Review the insurance and safety procedures for special events such as parades and fireworks and the use of public facilities by other organizations and individuals (See Resources).
- **Environmental Liability:** Monitor compliance with EPA regulations, including reporting requirements (See Chapter 10).
- **Community Safety:** Coordinate with the Safety Committee on community safety issues (See Chapter 13).
- **Ethics:** Oversee compliance with the Local Officials Ethics Act (See Chapter 14).
- **Freedom of Speech:** Institute procedures to protect the public's first amendment rights and the Open Public Meetings Act (See Chapter 15).

Selected Case Law:

Suarez v. Dosky (1980) [111]

Facts: The driver of a car involved in a minor one-vehicle accident on an interstate asked the investigating officer for a lift to a phone booth. This was before cell phones. The officer told the motorist to walk up the next exit ramp to a gas station and left the scene, believing that the motorist could handle the situation. Unfortunately, while walking on the ramp, one of the children with the motorist was killed by a passing car. The agency argued that police powers immunity shielded the officer's decision.

Decision: The Appellate Division ruled that this was not a question of enforcing or not enforcing the law and that law enforcement immunity does not apply to negligence in the performance of ministerial duties. The officer responding to the situation had a ministerial duty to protect the children.

Comment: In this early decision, the courts clarified that law enforcement immunity was limited to the actual enforcement of laws. In a 2010 case, the court reached a similar decision when it held that police officers were negligent in performing ministerial duties because they failed to look for the driver of a van that was wrecked on a guardrail. The undiscovered driver died several hours later in the wooded area just off of the roadway. [112]

Freytag v. Morris County (1981) [113]

Facts: The county allowed people to toboggan down a path in a county park. The county knew that people were using the path as a toboggan run and also knew that, at some point, someone moved rocks to create a border down the path. A tobogganer hit one of the rocks and was injured.

Decision: The court ruled that unimproved property immunity applied. Even though the rocks had been moved, that did not change the general unimproved character of the area.

Comment: Contrast this decision to a 1989 case, Troth v. State, [114] where a boater went over the dam spillway deep in a wooded park area. The court found the state liable for not adequately protecting the spillway even though the area around the dam was otherwise unimproved property. The distinction is that rocks are a natural material, and a rock border along a path does not make the path improved property. However, a dam is not a natural structure and is not eligible for the immunity. These cases are very fact sensitive.

Shuttleworth v. Conti (1984) [115]

Facts: An intersection accident occurred when a motorist failed to stop because foliage covered the stop sign. The town argued that it was eligible for immunity because it lacked the resources to trim all of the foliage around town.

Decision: The court ruled that the allocation of scarce resources immunity did not apply because leaving stop signs obscured was palpably unreasonable.

Comment: This decision only applies to vegetation in the immediate area around the stop sign. In Johnson v. Southampton, [116] a case involving the encroachment of vegetation onto the road, the court found immunity and wrote: "The limited ability to make observations on either side of the road caused by trees and vegetation simply served as a warning that due care must be maintained." [117]

Klatch v. Lindedahl (1985) [118]

Facts: A motorist lost control of his vehicle at a dangerous curve that lacked a warning sign. The plaintiff was also able to show that the speed limit was entirely too high and that there had been numerous accidents at this curve over the years. Therefore, the town was on notice but failed to act.

Decision: The New Jersey Supreme Court held that discretionary immunity applies to the placement of permanent traffic signals and signs, and the establishment of speed limits.

Comment: Without this immunity, public entities would be sued in almost every vehicle accident under that allegation that a sign or lowered speed limit would have prevented the mishap. Once a sign is erected, however, it must be maintained. Further, the Act specifically provides that public entities can be held liable for failure to place emergency warnings. [119] For this reason, police should carry temporary warning signs in the trunks of their patrol cars.

Thompson v. Newark Housing Authority (1987) [120]

Facts: A child died in a fire at a high rise apartment building that lacked smoke detectors. The Housing Authority argued that it was eligible for design immunity because the plans had been approved before smoke detectors became mandatory.

Decision: The New Jersey Supreme Court ruled that design immunity did not apply in this case because the question of smoke detectors had not even been considered at the time of construction, and, therefore, there was no discretionary act to immunize.

Comment: While design immunity attaches in perpetuity, [121] the courts will sometimes bypass the immunity if the legislature has enacted new safety standards. For example, in 1999 New Jersey mandated that playgrounds be upgraded to comply with the standards promulgated by the Consumer Products Safety Commission.

Morely v. Palmer (1989) [122]

Facts: An officer responded to a call that an intoxicated person was in the middle of a major road. While the officer determined that the person was indeed intoxicated, he decided to take no further action and returned to his regular patrol. Three hours later, the intoxicated person crossed the road a quarter of a mile away and was killed by a passing truck. The person's family sued, claiming that the accident would not have happened if the officer had taken the person into custody.

Decision: The court ruled that the determination of whether the person met the criteria requiring custody was discretionary and, therefore, is entitled to immunity.

Bombace v. Newark (1991) [123]

Facts: Four children died in a tragic fire caused by a portable heater that was being used because of the lack of central heating in the privately-owned apartment. The family sued the city on the theory that the building inspector mishandled a complaint that the smoke detectors were inoperative.

Decision: The New Jersey Supreme Court ruled that the city and the inspector were protected under law enforcement immunity because they had not acted in bad faith.

Comment: Without this decision, construction code officials and fire inspectors would be sued in every fire or whenever other building defects caused accidents on the theory that inspections were negligent. This decision is also frequently cited when the courts define "bad faith."

Levin v. Salem County (1993) [124]

Facts: A young man dove off of a county-owned bridge into a river, struck his head on a sandbar and suffered a broken neck. The bridge was improved property and not eligible for the unimproved property immunity. For years, the county had known that people often dove from this bridge but did not place any warnings and made no effort to stop the practice.

Decision: The court ruled that the county was not liable because the injured party must establish that the property was being used for its intended purpose. Bridges are not intended to be diving platforms.

Comment: While public entities have a duty to station lifeguards at pools, generally, they do not have an obligation to station lifeguards or otherwise post signs at beaches, lakes and other places where people may swim. When a town acts to provide protection, appropriate warning signs should be posted. Further, while a municipality can be held liable for a lifeguard's negligence, that liability does not extend to natural hazards such as shifting sands and rip tides.

Fagen v. Vineland (1994) [125]

Facts: A suspect stole a vehicle and was chased by police until the suspect crashed into another motorist. The chase did not follow Attorney General guidelines.

Decision: Normally, *Title 59* section 5-2 gives the police immunity if a third party is injured as a result of a police pursuit, even if the chase did not follow the Attorney General guidelines. However, the town can be sued in federal court if it fails to properly train the officers on pursuit guidelines. Federal law supersedes the state immunities under *Title 59*.

Comment: While it goes against instinct, sometimes it is better to end a chase before someone in the public, or the officer, is injured.

Kneipp v. Tedder (1996) [126]

Facts: The police stopped a husband and wife as they staggered home one night from a bar. They allowed the husband to proceed because there were unattended children at home but detained his wife briefly. She was so intoxicated that she could barely stand. After they released her, she started to walk home but didn't make it. She was only a block from her home when she passed out in the cold and suffered serious brain damage before she was found.

Decision: A federal court held that the officer was responsible for the woman's injuries under the "state-created danger" theory. This is an example of federal law superseding state law. A key factor in this decision is that the police took the woman into custody, sent her husband home, and then released her knowing that she was extremely intoxicated. There would have been no liability except for the fact that they had retained her. Once they intervened, they had responsibility for her safety.

Garrison v. Middletown (1998) [127]

Facts: The plaintiff, who was 16 at the time, injured his knee playing football in the town parking lot adjacent to the train station. The edge of the payment was one and a half inches lower than the adjacent gravel. The police knew the plaintiff and his friends often played football in the parking lot but ignored the situation.

Decision: The New Jersey Supreme Court ruled that the town was entitled to immunity because a municipal parking lot was not a ballfield and was not being used for its intended purpose.

Comment: The 1972 Attorney General's Task Force specifically warned the courts about adopting novel causes of action. This case is an example of how, on several occasions, the New Jersey Supreme Court has reviewed cases to remind the lower courts to stop ignoring the clear immunities in *Title 59*.

Petrocelli v. Sayreville Shade Tree Commission (1997) [128]

Facts: The Plaintiff was injured when her bicycle struck an uneven sidewalk caused by the roots of a "shade tree." She sued both the town and the Shade Tree Commission.

Decision: The court ruled that when the town establishes a "Shade Tree Commission," both the town and the commission become immune from lawsuits alleging a failure to maintain trees.

Jones v. Hartford (2003) [129]

Facts: At 4 a.m. the plaintiff was a passenger in a car stopped by police because it met the description of a vehicle that had been reported hijacked at gunpoint. One of the officers roughed-up and injured the plaintiff, even though the plaintiff did not resist. Fellow officers did not intervene. The report ultimately proved to be a hoax.

Decision: The court ruled that the fellow officers were not eligible for immunity and were liable because they have an affirmative duty to protect a citizen's civil rights.

Lodato v. Evesham (2008) [130]

Facts: A senior citizen tripped on a broken sidewalk in a residential zone. The town knew that the sidewalk was in serious condition but did not have an orderly plan to fix sidewalks. Instead it passed an ordinance that required homeowners to fix sidewalks at their expense.
Decision: The court found that the municipality was liable and could not transfer its liability to homeowners by simply passing an ordinance.

Comment: In residential areas, homeowners have common law immunity, and the entity that owns the road is responsible for the sidewalk; in this case the municipality. Passing an ordinance making homeowners responsible for sidewalk repair does not supersede the homeowner's common law immunity. The town can go to court to require the homeowner to repair the sidewalk, but the town remains liable if it is not repaired.

Morello v. Monmouth County Sherriff's Department (2015) [131]

Facts: While executing a child support warrant, a Sherriff's officer discovered the plaintiff sitting in a car smoking what appeared to be marijuana. When asked if he had any more drugs, the plaintiff said he had a loaded handgun tucked in his waistband and that he carried the gun because he was involved in gang activity and feared retaliation. The officer confiscated the weapon but failed to ask if the plaintiff had a permit. Later the charges were dropped when it turned out that, in fact, the plaintiff had the proper license to carry. The plaintiff then sued for false arrest.

Decision: The New Jersey Supreme Court unanimously ruled that when a plaintiff proves to be innocent, the officer can still defend against a claim alleging false arrest by establishing that probable cause existed, or if probable cause did not exist, that the officer believed "in good faith" that there was probable cause.

Stair v. NJ Transit (2016) [132]

Facts: The plaintiff slipped on black ice while walking at a train station. While NJ Transit had cleared snow on the platform the previous day, the plaintiff contended that it had failed to keep the platform in a safe condition.

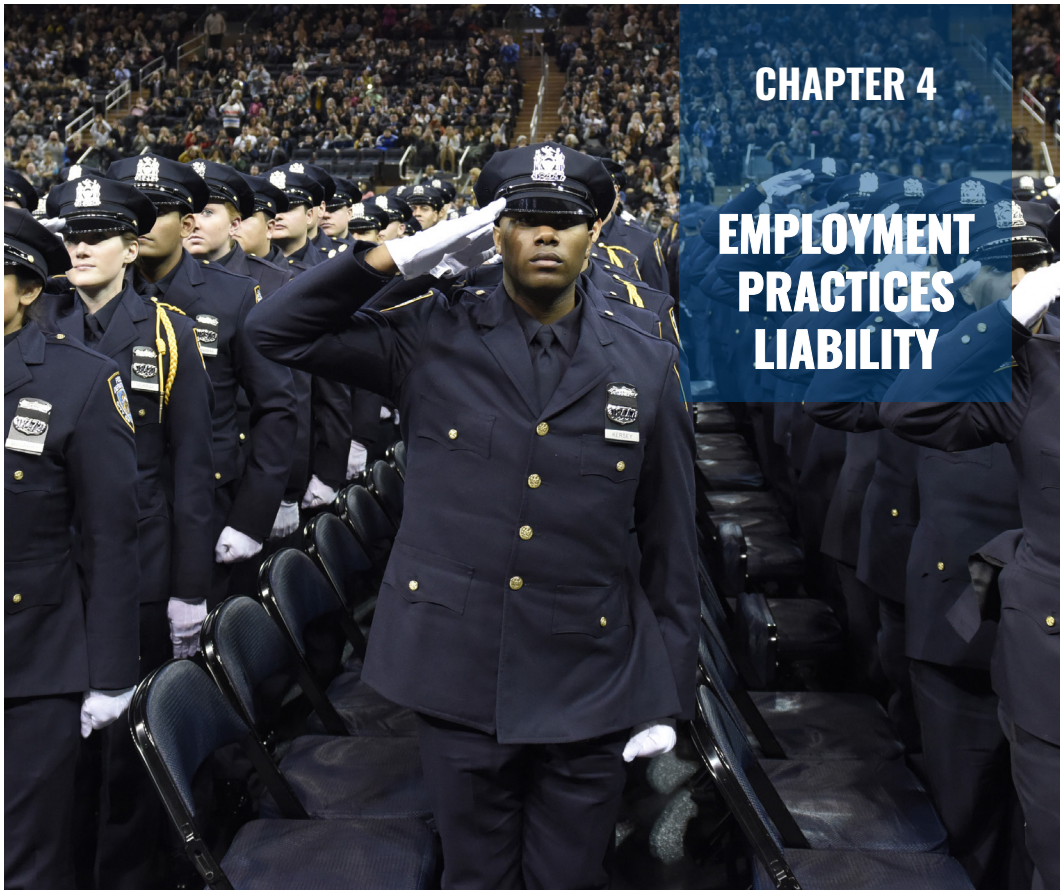
Decision: The court ruled that NJ Transit was eligible for common law snow and ice immunity. The court wrote that, "By their very nature, snow-removal activities leave behind 'dangerous conditions.' We can conceive of no other governmental function that would expose public entities to more litigation if this immunity was abrogated."

Comment: Municipalities are eligible for immunity even if they plow snow onto a sidewalk. [133] However, a municipality's broad snow and ice immunity does not apply to employees injured by slips and falls in municipal parking lots because they are eligible for workers' compensation. Housing Authorities do not enjoy common law snow and ice immunity because they are considered commercial landlords. [134]

Conclusion

Title 59 is complicated, and you need the advice of your local government's attorney and the professionals retained by your JIF or insurer. We also strongly recommend that each governmental entity appoint a Litigation Risk Committee. The immunities granted by *Title 59* can be an effective tool to substantially reduce litigation exposure and provide public entities with the support to undertake programs and projects. However, it is critical that local governments create and maintain documentation of their efforts to address dangerous conditions and significant discretionary decisions.

[73] Lopez v. City of Elizabeth 245 N.J. Super. 153 (App. Div. 1991): *"While a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area which government has power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done."*
[74] Freeholders of Sussex v. Strader (1840)
[75] Bedrock Foundations v. Brewster (1959)
[76] Willis v. N.J. Department of Conservation 55 N.J. 534 (1970): The State maintained a bear cage at High Point Park. A 3-year-old lost her arm when she tried to feed sugar cubes to one of the bears. The NJ Supreme Court ruled that sovereign immunity was "out dated" and that the legislature must either adopt a Tort Claim Act (TCA) or be liable in the same fashion as any private entity.
[77] *N.J.S.A. 59:2-3 b.*
[78] *N.J.S.A. 59:3-3*
[79] *N.J.S.A. 59:3-6*
[80] *N.J.S.A. 59:3-7*
[81] *N.J.S.A. 59:3-14*
[82] DeVries and Carter v. Secaucus (2004)
[83] *N.J.S.A. 59:2-7*
[84] *N.J.S.A. 2A:53A-7, "Neither a public entity nor a public employee is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service."*
[85] *N.J.S.A. 59:5-4*
[86] *N.J.S.A. 59:3-3*
[87] Marley v. Palmyra 193 N.J. Super. 271 (Law Div. 1983)
[88] Leang v. Jersey City BOE 399 N.J. Super. 329 (App. Div. 208), aff'd in part, rev'd in part 198 N.J. 557 (2009)
[89] Bombace v. Newark 241 N.J. Super.1 (App. Div. 1990), aff'd in part and rev'd in part, 125 N.J. 361 (1991)
[90] Jones v. City of Hartford, 285 F. Supp. 2d 174 (D. Conn. 2003)
[91] *N.J.S.A. 59:3-3 and N.J.S.A. 59:5-2*
[92] Kolitch v. Lindedahl 193 N.J. Super 540 (App. Div.) reversed 100 N.J. 485 (1985)
[93] Rodgers v. Passaic Housing Authority 139 N.J. Super. 569 (app. Div.), certif. den. 71 N.J. 337 (1976): An infant visiting her grandmother was burned on uninsulated piping used to heat the apartment. The unit was built in the early 1950s, and subsequently, the safety standards changed. The court ruled that once design immunity is triggered, it remains in force. This immunity is subject to limited exceptions. See Thompson v. Newark Housing Authority 108 N.J. 525 (1987).
[94] *N.J.S.A. 59:2-3d*
[95] Lopez v. Elizabeth 584 A.2d 825 (1991)
[96] Lodato v. Evesham 388 N.J. Super 501 (App. Div. 2006)
[97] The immunity also does not apply to workers' compensation cases where an employee is injured on the job.
[98] Bligen v. Jersey City Housing Authority 619 A.2d 575 (1993)
[99] Petrocelli v. Sayreville Shade Tree Commission 297 N.J. Super. 544 (App. Div. 1997)
[100] Polzo v. Essex County 196 N.J. 569 (2008)
[101] *N.J.S.A. 59:4-8*
[102] *N.J.S.A. 2A:53A-13*
[103] Southland Corp. v. Edison, 217 N.J. Super. 158, 175 (1986)
[104] *N.J.S.A. App. A:9-52* provides that: *"Neither the State nor any political subdivision of the State under any circumstances, nor the agents, officers, employees, servants or representatives of the State or any political subdivision thereof, including all volunteers, in good faith carrying out, complying with, or attempting to comply with, any order, rule or regulation promulgated pursuant to the provisions of this act, or performing any authorized service in connection therewith, shall be liable for any injury or death to persons or damage to property as result of any such activity."*
[105] *N.J.S.A. 59:9-2d*
[106] *N.J.S.A. 59:9-2e*
[107] The time to file notice of claim on behalf of a minor does not begin until the minor's 18th birthday. The deadline to file suit is two years later when the individual turns 20 years of age.
[108] *N.J.S.A. 59:9-2c*
[109] City of Newark v. Hartford Accident and Indemnity 134 N.J. Super 537, 342 A. 2d 513 (1975)
[110] The Committee may also include other members of the governing body.
[111] 171 N.J. Super. 1 (App. Div. 1979) certify. Den. 82 N.J. 300 (1980)
[112] Ojinnaka v. Newark 420 N.J. Super. 22 (2010)
[113] 177 N.J. Super. 234 (App. Div. 1981)
[114] 117 N.J. 258 (1989), rev'd 222 N.J. Super. 420 (App. Div. 1988)
[115] 193 N.J. Super. 469 (App. Div. 1984)
[116] 157 N.J. Super. 518 (App. Div.), certify. Den. 77 N.J. 485 (1978)
[117] Also see Morrision v. Lumberton (1999) and Sopko v. Logan Township (2007).
[118] 193 N.J. super 540 (App. Div.) reversed 100 N.J. 485 (1985)
[119] *N.J.S.A. 59:4-4 "Failure to provide emergency warning signals. Subject to section 59:4-2 of the act, a Public entity shall be liable for injury proximately caused by its failure to provide emergency signals, signs, markings or other devices if such devices were necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."*
[120] 108 N.J. 525 (1987)
[121] Rodgers v. Passaic Housing Authority 139 N.J. Super 569 (App. Div.) certify. Den. 71 N.J. 337 (1976)
[122] 232 N.J. Super. 144 (App. Div. 1989)
[123] 241 N.J. Super.1 (App. Div. 1990), aff'd in part and rev'd in part, 125 N.J. 361 (1991)
[124] 133 N.J. 35 (1993)
[126] 95 F.3d 1199 (3rd Cir. 1996)
[127] 154 N.J. 282 (1998)
[128] 297 N.J. Super. 544 (App. Div. 1997)
[129] 285 F. Supp. 2d 174 (D. Conn. 2003)
[130] 388 N.J. Super 501 (App. Div. 2006)
[131] A-88-13 073978
[132] Unpublished decision
[133] Nappi v. Secaucus (2015)
[134] Bligen v. Jersey City Housing Authority 249 N.J. Super. 440 (App. Div. 1991) aff'd, 131 N.J. 124 (1993)



CHAPTER 4

EMPLOYMENT PRACTICES LIABILITY

In recent years, there has been a dramatic increase in lawsuits alleging workplace discrimination and harassment. Employees are no longer willing to accept employment-related bad behavior and look to the courts for relief. There is a distinct difference in the nature of employment cases between the public and private sectors because many public sector cases include allegations of political discrimination. Under federal law, the adage "to the victors belong the spoils" only applies to a few confidential managerial positions, including the Manager or Executive Director. [135]

The reality is that any major personnel action without well-documented performance issues, with all the "i's dotted and t's crossed," will probably result in litigation. [136] Many local governments need to improve their performance appraisal programs significantly. Too often, an employee was rated "outstanding" year after year until receiving the first unsatisfactory appraisal just before termination. Without building the file and following the appropriate procedures, you will lose every time.

Law Against Discrimination (LAD) [137]

The New Jersey Law Against Discrimination (LAD) was the first such statute in the country in 1945. It has since been amended numerous times to add protections based on age, sex, disability and sexual orientation. For the first 45 years, relief in LAD cases was mostly injunctive, meaning that a court order required the defendant to stop a discriminatory practice. In 1990 the Legislature amended the Act to include "all remedies available in common law tort actions," including monetary damages.

The Act also allows "fee-shifting," where the defendant must pay the plaintiff's legal bills if there is any award. As a result, legal costs now represent approximately 70% of the total cost of employment-practice actions. In one case, the plaintiff rejected a settlement offer of $75,000 and was awarded only $20,000 by the jury. The plaintiff's counsel submitted a fee application of $671,000 and eventually received $450,000, showing no proportionality between the jury award and the attorney fees. [138]

Most early employment lawsuits against local government involved equal opportunities. In particular, women and other minorities were forced to use the courts to break into local government. Fortunately, we don't see as many of these lawsuits today because people have become more cognizant of these laws' requirements. While overt racial or gender discrimination is rare in the public sector, disparate treatment is more common. [139]

Today, we see far more lawsuits arising from promotional disputes. Approximately two-thirds of these cases come from police departments. Almost every patrol officer aspires to become Chief, and often resort to litigation when another candidate is promoted. That is why a formal management succession plan is so important.

It is also critical that elected officials insulate themselves from charges of either favoritism or retaliation. To prevent these lawsuits, your community should:

- Adopt a Police Promotional Ordinance.
- Have an outside agency interview qualified candidates and provide an objective analysis.
- If your town is not civil service, an outside agency should also conduct a written test.

On the Job Harassment

Another common issue concerns workplace harassment. The New Jersey Division of Civil Rights reported:

> "A recent survey found that 81% of women and 43% of men have experienced some form of sexual harassment during their lifetime. This includes verbal, physical and cyber harassment and sexual assault. Sixty-eight percent of women reported being sexually harassed in a public space, 38 percent at work and 31% at their residence. Sexual harassment affects people regardless of race, religion, gender, sexual orientation, gender identity or expression." . . . "However, because it is fueled by power imbalances, marginalized communities including women of color, immigrants, domestic workers, LGBTQ+ people and others are uniquely vulnerable to sexual harassment." [140]

The New Jersey Supreme Court also made it easier to win harassment lawsuits in its 1993 landmark decision in Lehmann v. Toys R Us. [141] Theresa Lehmann, a supervisor in a purchasing department, was subject to numerous touching incidents, unwanted sexual advances and inappropriate comments by her superior. She complained but was told to handle it herself rather than report it to the next level. She ultimately became fed up and went higher, but the bad behavior continued. She was offered a transfer but rejected that approach, complaining that she should not be forced to change jobs because of her supervisor's bad behavior. She then resigned and sued.

The New Jersey Supreme Court ruled that an employer is responsible for sexual harassment committed by its supervisory employees unless it has an effective anti-harassment program. The keyword here is effective.

The Lehmann decision is not limited to sexual harassment and extends to all harassment in the workplace based on an employee belonging to a protected class. The principle also applies to race, national origin, disability and sexual orientation. Such harassment is actionable if it creates what a reasonable person would consider a situation "sufficiently severe or pervasive to create an intimidating, hostile or offensive working environment." The old-fashioned office or locker room "give and take" has become a serious litigation problem. [142]

In 2002, the Lehmann decision was clarified by the New Jersey Supreme Court in Mancini v. Teaneck. [143] This case concerned the first female police officer hired by the town, who then suffered over 15 years of what the court described as "low-level harassment," defined as no sexual advances or touching, as in Lehmann, but rather a continuing pattern of sexually-based jokes and slights. She complained several times, but the town's actions were ineffective because the Police Department resisted change. The Chief for most of the period in question opposed allowing women into the Department. The officer became fed up, sued and a jury decided the case in her favor.

The township appealed on numerous grounds, in particular, that the judge allowed the plaintiff's attorney to present evidence of a number of alleged incidents that occurred in the 1980s, before the commencement of the two-year statute of limitations under the LAD, arguing that allowing testimony on these earlier incidents had prejudiced the jury's award.

The New Jersey Supreme Court found, however, that even low-level sexual harassment is actionable if a reasonable woman would believe that the working environment is hostile, and the employer lacked an effective anti-harassment program. Further, the court ruled that if there was harassment during the period allowed under the statute of limitations, then prior activity can also be included as evidence of a "continuing tort."

In Mancini, the officer received $125,000 in compensatory damages and $500,000 in punitive damages, plus interest. Her attorney received $700,000 in fees. The town paid its attorneys approximately $1 million for a total of almost $3 million. Unfortunately, the town was not insured. Even if it had been, by law, the insurer could not pay punitive damages. Employment Practices Liability policies also have substantial deductibles and co-payments, and usually do not cover lost wages.

Conscientious Employee Protection Act (CEPA) [144]

In recent years, we have also seen a dramatic expansion of cases alleging violations of the Conscientious Employee Protection Act (CEPA), or "whistleblower act." CEPA was adopted by the New Jersey Legislature in 1985 to prevent the so-called "Serpico" situation, where a governmental employee is fired or demoted in retaliation for focusing the spotlight on official activity that harms or potentially harms the general public.

Among other things, the Act provides that:

> "An employer shall not take any retaliatory action against an employee because the employee discloses an activity, policy or practice that the employee reasonably believes:
>
> (1) Is in violation of law, or
>
> (2) Is fraudulent or criminal."

As with LAD, "fee-shifting" applies, but the statute of limitations under CEPA is one-year as opposed to that of LAD's two-year time frame. Under another provision, employers must display a notice about CEPA in English and Spanish on a bulletin board assessable to all employees and provide notice of the law to each employee annually.

The problem increasingly encountered by local government is that both CEPA and LAD are now used in the governmental sector as leverage to fight almost any otherwise legitimate job action. If an employee is terminated or disciplined, you can be almost certain of a CEPA or LAD lawsuit. The "fee-shifting" provisions have made these cases especially attractive to attorneys.

Family Medical Leave Act (FMLA) [145]

The Family Medical Leave Act (FMLA) provides employees the right to 12 weeks of unpaid leave during any 12-month period for family or health-related matters. During this period, employees are permitted to utilize accrued paid vacation, paid sick or family leave benefits. Upon exhaustion of FMLA leave, employees are generally entitled to either be restored to their previous position or an equivalent position, subject some limitations. No employee is entitled to "any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken the leave." [146]

Under various state laws, employees caring for a relative with a serious illness, unable to work because of a disability or requiring protection in the wake of domestic violence are potentially entitled to additional benefits. [147] These laws, including FMLA, prohibit retaliation based on an employee's exercise of these rights. These issues are complicated, and employers should seek the advice of their employment attorneys.

The FMLA provides employees with a limited right to restoration to a previous employment position. The Act does not protect employees against termination for a reason other than interference with rights under FMLA. An employee discharged during or at the end of protected leave for a reason unrelated to the leave has no automatic right to reinstatement. An employer can avoid liability under the FMLA if it can prove that it would not have retained an employee independent of the FMLA leave. Extreme caution should be exercised whenever taking a personnel action that could adversely affect an employee who is on FMLA leave, has taken FMLA leave or has communicated an intention to take FMLA leave.

Litigation Risk Committee

Under the Lehmann decision an employer must put in place:

- Written policies and procedures that prohibit discrimination and harassment in the workplace. The MEL has responded by developing a Model Employment Policies and Procedures Manual that is updated every two-years, available at NJMEL.org.
- Both formal and informal employee complaint procedures. These are also included in the MEL Manual.
- Mandatory management personnel training should be provided along with training for all other employees. Every two-years, the MEL develops specific training programs for managers and supervisors, Police Chiefs and non-managerial personnel. The program and instructor's guide are available at NJMEL.org and through the MEL Learning Management System.

- A system to monitor compliance "to make sure the complaint structure is trusted." For example, it is good practice to ask employees about any instances of harassment during their annual personnel evaluation.
- An unequivocal commitment from senior management that demonstrates consistent practice through action over words. The MEL conducts seminars for elected officials each year to support this practice.

The Lehmann requirement of an effective remedial program is not meant to be an automatic safe harbor. The court wrote in its decision, "We do not hold that the absence of such mechanisms automatically constitutes negligence, nor that the presence of such mechanisms demonstrates the absence of negligence."

Selected Case Law:

Moorestown v. Armstrong (1965) [148]

Facts: A police officer was fired for "conduct unbecoming" after a series of incidents, including an altercation with his wife, where he threatened to kill the Chief and take his own life. The Civil Service Commission determined that he was guilty of the infractions but found that the penalty was too severe compared to penalties to other employees for similar offenses. The town appealed.

Decision: The courts held that police officers can be held to a higher standard because they carry weapons and have arrest powers.

Comment: You must be very careful when instituting a major personnel action because the town can still be sued for disparate treatment between police officers or for violating CEPA.

Gaines v. Bellino (2002) [149]

Facts: A female corrections officer at a county jail was kissed against her will by her shift supervisor. She mentioned the incident to several other supervisors who suggested that she report the incident, but she was concerned about possible retaliation. There were several other incidents over the following years. Finally, senior management became aware of the situation because of another case involving this supervisor, who was then suspended and retired.

During depositions, the corrections officer admitted that she was aware of the county's strict anti-harassment policy and that she would be protected if she reported inappropriate activity. The county admitted that it had not provided training to managerial employees but argued that the decision in Lehmann v. Toys R Us specifically provided that an employer was not automatically liable just because one of the program's elements was missing. Further, under the U.S. Supreme Court decision in Faragher v. Boca Raton, [150] an employer also has a defense if the employee unreasonably failed to take advantage of any preventative or corrective opportunities.

Decision: The New Jersey Supreme Court held the county liable and emphasized that the lack of managerial training was especially significant. The court ruled that because the officer had reported the incident to people in management, they then had an obligation to take it higher even though the corrections officer did not do so herself.

Comment: When anyone in management is aware of a situation, they do not have the luxury of sitting on the problem. [151]

Lakes v. Brigantine (2007) [152]

Facts: A DPW worker complained when fellow employees started to shoot pigeons nesting in the garage. Management did not think the issue warranted serious consideration, and fellow employees started teasing the complaining worker as "Pigeon Man." The worker complained about this harassment and ultimately sued under CEPA.

Decision: The court ruled that the town was liable because harassment from fellow employees could be considered a form of retaliation under CEPA if management failed to take appropriate steps to halt the harassment. After this ruling, the jury awarded the plaintiff $250,000 for compensatory damages and $400,000 for punitive damages and fined the town another $10,000.

Comment: Even the judge was shocked enough to reduce the compensatory award to $100,000 and the punitive award to $100,000.

Cutler v. Dorn (2008) [153]

Facts: A Jewish officer sued under LAD because of a series of minor comments and jokes over the years. In some cases, the officer participated in the "give and take." The judge threw out the case, and the officer appealed. The Appellate Division agreed with the lower court judge and ruled that the comments in question were only "breaking chops and teasing." The issue then went to the New Jersey Supreme Court.

Decision: The New Jersey Supreme Court disagreed with the Appellate Division's ruling that the comments in question were only "ribbing" and "breaking chops" and wrote that the appellate court's statement, "undervalues these stereotypic references and demeaning comments" and "those isolated incidents could be viewed, in the aggregate, to create an objectively humiliating and painful environment."

Comment: So-called "locker room talk" is now actionable. Management must make it clear that such conduct will not be tolerated and must act consistently to enforce its anti-harassment policy.

Groslinger v. Wyckoff (2009) [154]

Facts: A police officer alleged gender discrimination and sexual harassment after her supervisor and several employees made caustic remarks when she could not continue work during a difficult pregnancy. The town administrator, who had a reputation for consistently enforcing the town's harassment policies, investigated the complaints and found that the supervisor's remarks were inappropriate but found no discriminatory intent. He disciplined the supervisor and ordered additional anti-harassment training.

Decision: The court granted a summary judgment dismissing the case because the town consistently implemented its anti-harassment program.

Winters v. North Hudson Regional (2012) [155]

Facts: A long-time Fire Department Captain, who was a frequent and vocal critic of workplace practices, was terminated following Civil Service Commission proceedings involving separate disciplinary matters for violations of sick time rules. The Captain contended that the charges were in retaliation for his whistleblowing, but Civil Service rejected this claim. He then sued under CEPA.

Decision: The court ruled that once the employee lost the Civil Service Action in which he asserted retaliation as a defense, he was stopped from instituting action under CEPA for the same alleged offense. Specifically, the court wrote:

> "When an employee and employer engage the system of public employee discipline established by law and the employee raises a claim that employer retaliation at least partially motivated the decision to bring the charge or the level of discipline sought, both the employee and employer must live with the outcome, including its potential preclusive effect on related employment-discrimination litigation as a matter of the equitable application of estoppel principles."

Vaticano v. Edison (2013) [156]

Facts: The Deputy Police Chief alleged that he was not promoted to Chief because he supported the Mayor's opponent. He cited several exchanges which demonstrated that the Mayor was aware of the Deputy's Chief's politics, including a clash between them at a campaign event. Subsequently, the Mayor promoted a less senior individual to head the police department. The Mayor countered that his decision was based on relative qualifications and not politics.

Decision: Upholding summary judgement the Third Circuit Court decided that the town was not liable and wrote that that the plaintiff, "…may not rest upon mere allegations, general denials or vague statements to survive summary judgment." [157] The township won this case because it presented a well-documented basis for the Mayor's chosen candidate.

Hahn v. Edison (2013) [158]

Facts: An officer alleged that his transfer from the County Narcotics Task Force to the patrol division was in retaliation for his advocacy as the police department union representative and, therefore, was a CEPA violation. One of the officer's specific complaints was that the Mayor promoted his campaign supporters within the Police Department. He also objected to the placement of cameras in police cars and cited numerous minor complaints as examples of retaliation.

Decision: The court ruled that the town was not liable under CEPA because he did not blow the whistle on official activity that harms or potentially harms the general public. The court wrote:

> "A statutory limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee."

Comment: The employee might still have had a cause of action, depending on the facts, if the lawsuit was filed under other statutes that protect union activity.

Buonanno v. Elmwood Park (2014) [159]

Facts: A construction official was laid-off when the town voted to hire the neighboring town to perform this function. The official alleged that one of the council members violated the common law and Local Government Ethics Law by voting on the consolidation. The construction official alleged that the council member was an active builder in the neighboring town and that his work was inspected by that town's construction code official who was now going to be responsible for both towns.

Decision: The court ruled that the construction official must be rehired with back pay. The vote to eliminate the position was invalid because a council member inadvertently violated the Ethics Act by voting to retain the town's construction office where he was active as a builder.

Comment: Many cases have been lost because of simple procedural errors. When someone loses their position, you can expect them to look for any excuse to overturn the action.

Kownacki v. Saddle Brook Board of Education (2014) [160]

Facts: A custodian alleged that his three-day suspension for failure to report an accident was retaliation for whistleblowing over the years on issues such as asbestos in the building. The lawsuit was filed just under one year from the date of the suspension. However, the plaintiff attempted to introduce alleged acts of retaliation from over a year before the complaint filing.

Decision: The trial judge ruled that the statute of limitations still applied because the custodian failed to show any linkage between the suspension and the whistleblowing that occurred several years earlier.

Comment: CEPA is not a lifetime exemption from discipline.

J. S. v. Englewood Cliffs (2015) [161]

Facts: After numerous attempts to help him, a long-time officer of Lebanese ancestry was involuntarily retired for chronic. He fought the action, contending that he was forced to retire because he reported infractions by superiors. He also claimed that he was protected under the ADA and that the town's actions were motivated by his ancestry in retaliation for his having reported various legal violations.

Decision: The court upheld the town's actions because the Police Department was able to document the reasonableness of its efforts to help the officer over an extended period until it was obvious that the officer was not going to recover. Further, the court recognized that the other issues were a smokescreen to hide the real problem.

Comment: This case demonstrates the importance of maintaining proper documentation for personnel actions.

Smith v. Millville (2016) [162]

Facts: The Director of Operations at a rescue squad reported that he was having an affair with a volunteer and commencing a divorce against his wife, another employee of the squad. After he was fired, he sued based on the LAD provision that prohibits discrimination because of marital status.

Decision: The New Jersey Supreme Court ruled that the squad was potentially liable because LAD's protection based on marital status is not limited to being single or married and extends to people who are separated or divorced.

Sauder v. Colts Neck (2017) [163]

Facts: A 20-year member of a Volunteer Fire Department reported to an insurance company that the Department had made certain false statements in a claim involving embezzlement of the Department's funds by another member. The Department brought the volunteer up on charges and terminated him in a 14 to 8 vote. The volunteer sued, contending that the Department's actions violated CEPA. When the Department argued that CEPA only covers employees, the volunteer pointed out that under the law, volunteer firefighters are covered by workers' compensation and that they also receive a Length of Service Award (LOSAP) and uniform allowances.

Decision: The court ruled that for purposes of CEPA, volunteer firefighters are not employees.

Comment: Public safety volunteers are covered for workers' compensation because there is a specific provision that extends workers' compensation to volunteers CEPA has no such provision.

Conclusion

The line between liability and non-liability is not always clear. These cases are very dangerous because of "fee-shifting" and the reluctance of many judges to grant summary judgments. The court have established specific guidelines for what an employer must put in place to have any real defense in employment-related litigation. [164]

It is not sufficient to merely have an anti-harassment program on paper. Each employer must also have a system to monitor compliance "and to ensure that the complaint structure is trusted." Senior management must demonstrate an unequivocal commitment that is backed up by consistent practice.

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[135] Unreported case: A new Mayor decided to replace the town's 59-year-old clerk with a 37-year-old political supporter. The municipal attorney advised the Council that they could proceed because the existing clerk lacked tenure. This was very poor legal advice. A public entity cannot discriminate against someone based on politics or age just because they lack tenure.

[136] Unreported case: A police officer with a history of poor performance was fired after he inappropriately threatened to use his revolver "off-duty." Unfortunately, he had to be reinstated because the town failed to document the poor performance and failed to file charges concerning the inappropriate use of the revolver until after the 45-day cut-off.

[137] *N.J.S.A. 10:5-1 et seq.*

[138] Unreported case.

[139] Unreported case: A minority officer was terminated at the end of the probation period for poor performance. It was subsequently determined that in the past, non-minority officers with equally poor performance reviews were allowed to continue. The cost: $350,000. While it is perfectly legal to terminate someone for poor performance at the end of the probation period, it has to be done consistently.

[140] Rachel Wainer Apter, Director of the NJ Division of Civil Rights, Preventing and Eliminating Sexual Harassment in NJ, February 2020

[141] 132 N.J. 587 (1993)
[142] Unreported case: A female DPW worker was subject to constant sexually-oriented jokes and complained to her supervisor. She was told that "give and take" is part of the job and to "suck it up." The supervisor's statement was simply wrong. Under current law, the employer can be held liable for harassment if the employer lacks an effective anti-harassment program.
[143] 349 NJ Super.527, 794 A.2d 185 (2002)
[144] *N.J.S.A. 34:19-1 et seq.*
[145] *29 U.S.C. § 2612 et seq.*
[146] *26 U.S.C. § 2614 (a)(3)(B)*
[147] *N.J.S.A.* 34:11B-1 et seq., *N.J.S.A.* 43:21-27 through 43:21-56
[148] 89 NJ Super. 560 (1965)
[149] 801 A.2d 322, 202 N.J. (2002)
[150] 524 U.S. 775 (1998)
[151] Recently in Aguas v. New Jersey, the New Jersey Supreme Court reaffirmed its Gaines decision again. The court wrote, *"If no tangible employment action has been taken against the plaintiff, the defendant may assert the two-pronged defense: first that the employer exercises reasonable care to prevent and correct promptly sexual harassing behavior; and second, that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm."*
[152] ATL-L-220-05 (2007)
[153] 196 N.J. 419 (2008)
[154] A-5861-07T25861-07T2 (2009)
[155] A-45/46/47-10 (2012)
[156] US District Court 09-cv-01751 (2013)
[157] These cases are very fact sensitive. Contrast the Viticano decision with an unreported settlement where the Mayor in a Commissioner Form of municipal government was found liable after he directed that all employees who had actively supported his opponent be terminated. The Mayor's actions were so blatant that he had to take the 5th amendment at a deposition.
[158] A-1367-11T2 (2013)
[159] A-0742-12T3 (2014)
[160] A-5548-11T4 (2014)
[161] A-5548-11T4 (2015)
[162] A-19-14 (2016)
[163] 451 N.J. Super.581 (App. Div. 2017)
[164] All of the materials you need to put together an effective program are available at NJMEL.org.

CHAPTER 5

THE AMERICANS WITH DISABILITIES ACT (ADA)

Eric Harrison, a senior member of the MEL Defense Panel, wrote this chapter.

The Americans with Disabilities Act (ADA), signed by President Bush in 1990, is often credited as the world's first civil rights law for people with disabilities. The Act is a bipartisan effort intended "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." [165]

President Bush introduced the ADA with soaring rhetoric that matched the Act's lofty ambitions:

> "With today's signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom." [166]

The ADA bans discrimination on the basis of disability in the areas of employment, public accommodation, public services, transportation and telecommunications.

- *Title I* addresses employment.
- *Title II* addresses public services, programs, and activities provided by State and local governments.
- *Title III* addresses public accommodations such as restaurants, theaters offices and places of business.

Title I

The ADA prohibits employers, employment agencies and labor unions from discriminating against qualified individuals with disabilities, defined as a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities.
- Has a record of an impairment.
- Is regarded as having such an impairment.

An employer is required to make a "reasonable accommodation" if it would not impose an "undue hardship." Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee, and no two people require the same accommodation(s). Reasonable accommodations may include:

- Making existing facilities accessible to persons with disabilities.
- Job restructuring, modifying work schedules or reassignment to a vacant position.
- Acquiring or modifying equipment, adjusting or modifying examinations, training materials, or policies and providing qualified readers or interpreters.
- Providing a deaf applicant with a sign language interpreter during the job interview.
- Allowing an employee with diabetes regularly scheduled breaks during the workday to eat properly and monitor their blood sugar and insulin levels.
- Changing the schedule of an employee with cancer to accommodate radiation or chemotherapy treatments.

An employer does not have to provide an accommodation if it imposes an "undue hardship," defined as "an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation." For example, an employer is not required to lower its quality or production standards or provide personal use items such as glasses or hearing aids.

An employer does not generally have to provide a "reasonable accommodation" unless an individual with a disability has asked for one. An employer may ask an employee if they need a "reasonable accommodation" if the employer believes that a medical condition is causing a performance or conduct problem. Once a "reasonable accommodation" is requested, the employer should talk with the individual and identify the appropriate action. Failure to have an "interactive dialogue" can by itself be grounds for liability. If more than one accommodation would work, the employer may choose the one that is less costly or easier to provide.

If an employee can no longer continue in their current position, an employer is not required to create a new position. If another position is open, the individual must be able to accomplish that position's essential functions with "reasonable accommodation." A transferred employee is entitled to the new position's rate of pay, not that of their previous position.

Other Provisions of Title I:

- **Medical Examinations and Inquiries:** Employers may not ask job applicants about the nature or severity of a disability but can ask about their ability to perform specific job functions. A job offer may be conditioned on a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations must be job-related and consistent with the employer's business needs.
- **Drug and Alcohol Abuse:** Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.
- **Confidentiality:** The basic rule is that employers must keep medical information they learn about an applicant or employee confidential, with limited exceptions. Information can be confidential regardless of whether it is generated by a healthcare professional or contains any medical diagnosis or treatment course. For example, an employee's "reasonable accommodation" request is considered medical information subject to the ADA's confidentiality requirements.

Health Insurance Portability and Accountability Act (HIPAA)
The Department of Health and Human Services (HHS) further protects employee health information under the federal Health Insurance Portability and Accountability Act of 1996. HIPAA established national standards to protect patients' sensitive health information from being disclosed without their consent or knowledge.

Privacy Rule: The HIPAA Privacy Rule covers the use and disclosure of individuals' health information, known as "protected health information (PHI)," by the following entities:

- **Healthcare Providers:** Every healthcare provider who electronically transmits health information in connection with claims, benefit eligibility, referral requests, and other similar transactions, regardless of practice size.
- **Health Plans:** Entities that pay the cost of medical care, including insurers, health maintenance organizations (HMOs), Medicare, Medicaid, Medicare+Choice, and Medicare supplement insurers and long-term care insurers, excluding nursing home fixed-indemnity policies. Employer-sponsored health plans, government and church-sponsored health plans, and multi-employer health plans are also health plans. [167]
- **Business Associates:** A person or organization, other than a member of a covered entity's workforce, using or disclosing individually identifiable health information to perform functions such as claims processing, data analysis, utilization review and billing.

Permitted Uses and Disclosures: A covered entity is permitted to use or disclose protected health information, without an individual's authorization, under limited circumstances. For example:

- Treatment, payment and healthcare operations.
- Limited dataset for research, public health or healthcare operations.
- The Privacy Rule also permits use and disclosure of protected health information, without an individual's authorization, for 12 national priority purposes:
  - When required by law.
  - Public health activities.
  - Victims of abuse or neglect or domestic violence.
  - Health oversight activities.
  - Judicial and administrative proceedings.
  - Law enforcement.
  - Functions (such as identification) concerning deceased persons.
  - Cadaveric organ, eye, or tissue donation.
  - Research, under certain conditions.
  - To prevent or lessen a serious threat to health or safety.
  - Essential government functions.
  - Workers' compensation.

Security Rule: While the HIPAA Privacy Rule safeguards PHI, the Security Rule protects all individually identifiable health information a covered entity creates, receives, maintains or transmits in electronic form. This information is called "electronic protected health information(e-PHI)." The Security Rule does not apply to orally transmitted or hand-written PHI. To comply, all covered entities must:

- Ensure the confidentiality, integrity and availability of all e-PHI.
- Detect and safeguard against anticipated threats to the information's security.
- Protect against anticipated impermissible uses or disclosures.
- Certify workforce compliance.

Covered entities should rely on professional ethics and best judgment when considering requests for these permissive uses and disclosures. All complaints should be reported to the HHS Office for Civil Rights, which enforces HIPAA rules. HIPAA violations may result in civil, monetary or criminal penalties.

Title II

The ADA requires public entities to provide "reasonable accommodations" to the extent necessary to ensure equal access to the public of all governmental programs and services. Most *Title II* litigation arises from disputes over what accommodations are reasonable and what determination process should be employed. Failure to provide a "reasonable accommodation" is equivalent to an act of discrimination, whether or not the public entity or official has discriminatory animus towards the disabled. Put differently, good faith is no defense to a claim that local government or its employee failed to provide a "reasonable accommodation."

The New Jersey Law Against Discrimination (LAD) also protects individuals with disabilities and State courts generally follow Federal ADA principles when construing LAD.

Federal Regulations

Under federal regulations, existing public facilities built or last altered before January 26, 1992, are treated differently from those built or altered after that date. These "grandfathered" facilities are subject to the following regulations:

Existing Facilities

"(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not--

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(b) Methods--

(1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section."

As the United States Supreme Court noted in Tennessee v. Lane, [170]

"Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes."

New Construction and Alterations: [171] Under ADA regulations, facilities that are constructed or altered after January 26, 1992, generally must comply with the ADA Standards for Accessible Design and the ADA Architectural Guidelines. New facilities and alterations generally must comply with the ADA Standards for Accessible Design and the ADA Architectural Guidelines:

"(a) Design and construction.

(1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(2) Exception for structural impracticability.

(i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(iii) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(b) Alterations.

(1) Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(2) The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

(3) (i) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c).

(ii) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(4) Path of travel. An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

Disproportionality:

(A) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(B) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:

(1) An accessible entrance;
(2) An accessible route to the altered area;
(3) At least one accessible restroom for each sex or a single unisex restroom;

(4) Accessible telephones;
(5) Accessible drinking fountains; and
(6) When possible, additional accessible elements such as parking, storage, and alarms."

Standards for Accessible Design

In 2010 the Department of Justice issued revised ADA Standards for Accessible Design (ADASAD), which incorporate the 2004 ADA Architectural Guidelines (ADAAG) and articulate enforceable scoping and technical standards for new construction. [172]

Experience with local government construction teaches that disputes and litigation most frequently arise because of disregard of the regulations, either through ignorance of their existence or a mistaken belief that they are preempted by other code, not the misapplication of ADA regulations.

Most New Jersey code officials, engineers, architects and builders are familiar with the American National Standards Institute (ANSI) guidelines, the Council of American Building Officials (CABO) building code, the New Jersey Barrier Free Subcode [173] and a host of other standards applicable to new construction. However, even the most competent professionals have only passing familiarity with the ADA Standards or the ADAAG. The absence of any express legal requirement that construction officials deny a permit or a Certificate of Occupancy to a builder or local government whose plans run afoul of ADA regulations compounds the problem.

Strict compliance with all applicable ADA Standards and ADAAG is all but impossible in many instances, which is why 28 CFR § 35.151(a)(2) sets forth a detailed "exception for structural incompatibility." When the application of a regulatory exception has been considered before the project's completion, it is much easier to defend a design or building based on that application. Even if the exception seems valid, it will carry considerably less credibility with a judge if invoked for the first time after a member of the public complains or sues.

Access to Public Programs and Services

The ADA and LAD also apply to programs and services offered to the public. New Jersey regulations [174] enforcing LAD provide that places of public accommodations are, "to the extent reasonable," required to accommodate "a person with a disability in the most integrated setting appropriate to the needs of that person." The law generally recognizes two broad categories of access claims against public entities, "particularized claims of a failure to reasonably accommodate" and "generalized claims of an overall lack of access." [175]

A claim that a building has been constructed incorrectly, such that all individuals dependent on wheelchairs cannot move within it, would qualify as a "generalized claim of an overall lack of access," also called "program inaccessibility claims." A claim by a disabled individual who requires a specific accommodation within the building, such as assistance reaching books within a library or using a public computer, would qualify as a "particularized claim of a failure to reasonably accommodate." "Particularized reasonable accommodation" claims require that the individual requiring assistance ask for it and engage in an "interactive process" with the municipality before suing. "Program inaccessibility claims" do not require such advance notice. [176] The line between the two claim categories can be blurry.

"Tester" Lawsuits

Like most civil rights legislation, the Americans with Disabilities Act and the Law Against Discrimination permit an award of attorney fees to successful plaintiffs. While so-called "fee-shifting" legislation supports the laudable goal of increasing representation of traditionally marginalized members of society, it also encourages fraud masquerading as advocacy.

A number of attorneys nationwide have joined with serial litigants to sue multiple local governments and businesses for alleged ADA violations. The plaintiffs characterize themselves as "testers" or "private attorneys general," enforcing the ADA on behalf of all similarly situated, disabled individuals who may not have the resources to assert their rights.

A typical suit takes the defendant by surprise with no preceding complaint or request for accommodation. It demands a few modest architectural modifications and payment of fees to the plaintiff's attorney. As the cost to defend such litigation is likely to far exceed the demand, defendants frequently have no prudent choice other than acquiescence in the demand. Some commentators have understandably decried this practice as a "shakedown." [177] Others have applauded the work of "testers" as filling a vacuum created by the Department of Justice's "under-enforcement" of the ADA. [178]

Litigation Risk Committee

A public entity with 50 or more employees is required to designate at least one responsible employee to coordinate ADA compliance. [179] Regardless of the number of employees, the Litigation Risk Committee should designate someone to coordinate the government entity's efforts to comply with *Title II* and investigate any inaccessibility claims. The name, office address and telephone number of the ADA Coordinator must be provided to interested persons.

The ADA Coordinator is often the main contact to assist someone who wishes to request an auxiliary aid or service for effective communication, such as a sign language interpreter or documents in Braille.

Designating an ADA Coordinator demonstrates a commitment to compliance and ensures consistent messaging internally and externally. With the help of publicly available resources such as the ADA Best Practices Toolkit published by the Department of Justice, [180] supplemental training where warranted and advice from your local government's attorney, the ADA Coordinator can answer questions consistently and accurately. The Coordinator can also take the lead in auditing the programs, policies, activities, services and facilities for ADA compliance.

The ADA requires every public entity to provide public notice of ADA rights. [181] Federal regulations define the target audience as applicants, beneficiaries and other people interested in the state or local government's programs, activities or services. An effective notice states the basic ADA requirements of the state or local government without being too lengthy, legalistic or complicated. The notice should include the name and contact information of the ADA Coordinator. A template may be found at the ADA Toolkit website. [182]

Local governments with 50 or more employees are also required to adopt and publish Grievance Procedures under *Title II*, [183] articulating a system for resolving complaints in a prompt and fair manner.

While neither *Title II* nor its implementing regulations describe what ADA Grievance Procedures must include, the Department of Justice has developed a model procedure included in the ADA Toolkit. [184] Accordingly, the Grievance Procedure should include:

- A description of how and where a complaint under *Title II* may be filed with the government entity.
- If a written complaint is required, a statement notifying potential complainants that alternative means of filing will be available to people with disabilities who require such an alternative.
- A description of the time frames and processes to be followed by the complainant and the government entity.
- Information on how to appeal an adverse decision.
- A statement of how long complaint files will be retained.

Once a state or local government establishes an ADA Grievance Procedure, it should be distributed to all agency heads and posted in public spaces of public building(s) and on the government's website. The procedure and contact information should be updated as necessary and must be available in alternative formats so that it is accessible to all people with disabilities. [185]

Selected Case Law:

Castro v. Borough of Ridgefield (2007)

Facts: Manuel Castro, a quadriplegic homeowner, applied for a zoning variance to add a handicap ramp to his front yard. The Board of Adjustment held the hearing on the third floor of Borough Hall, which was built long before 1992 and did not have an elevator. The Board did not propose an alternate location for the hearing and offered no assistance to Mr. Castro to reach the third floor. Once his wife dragged him up the stairs to the third floor, Mr. Castro was unable to use the bathroom because it was not handicap-accessible. The Borough claimed that it had no notice of Mr. Castro's needs because he did not request assistance even though it knew that his disability was the basis of his application.

Decision: A federal jury found the Borough liable for failing to provide "reasonable accommodations" to attend the meeting, notwithstanding the building's age and the absence of a formal request for assistance.

Comment: A public entity's responsibility to provide "reasonable accommodations" to access its programs and services extends to buildings and facilities that predate the ADA's enactment. An ADA Coordinator should ensure proper training of all municipal officials and employees so that they are sensitive to the needs of the disabled, even when not expressly the subject of a request for assistance.

Heusser v. N.J. (2008) [186]

Facts: A building maintenance worker for the Parkway with a Commercial Driver's License was promoted to a position in the road department. Most of the functions of the two positions were similar, including truck operations and lawn care. However, this employee had cerebral palsy and stumbled several times during the first two weeks of a six-month probationary period with the road department. As a result his supervisors determined that there was a potential safety issue and he was demoted to his original position.

The plaintiff challenged the action in court under the ADA, contending that the Highway Authority failed even to discuss possible accommodations. An expert witness also testified that the employee could perform most, but not all, road department functions.

Decision: The New Jersey Supreme Court ruled that the Highway Authority was liable because it failed to enter into an interactive dialogue to determine if "reasonable accommodations" were available. The court awarded the employee compensatory damages of $15,000 and awarded his attorney $456,000.

Comment: This case is especially important because the New Jersey Supreme Court discussed how "fee-shifting" should be calculated. In addition, the ADA does not require "unreasonable accommodations" or that an employer ignores safety concerns; it does require that management have an interactive dialogue with the employee. The court was further impressed that the employee already performed most of the road department's functions in his previous position. These discussions are complicated and should be left to professionals.

Stoney v. Maple Shade (2012) [187]

Facts: A disabled person filed suit against the township, alleging that she was not afforded proper access to the municipal building, downtown sidewalks and curb cuts or the park. Following a trial, a jury rejected all claims but those involving her inability to access the park and a bathroom in the municipal building. The jury declined to award damages, and the court denied her request for an order compelling the township to make improvements to the park. The disabled person appealed.

Decision: The Appellate Division held that the trial court erred in refusing to grant injunctive relief without considering all relevant factors. While the plaintiff in this case was arguably a "tester," in that she resided in another state, she still had standing because she claimed to visit Maple Shade, where her attorney resided, several times a year. Her failure to communicate her accessibility concerns to the township's ADA Coordinator was fatal to all of her claims except those involving the park, where recent repaving of a path failed to conform to the ADA Guidelines.

Comment: Her attorney was awarded substantial legal fees.

Lasky v. Moorestown (2012) [188]

Facts: A person with paraplegia filed suit against the township alleging that it discriminated against him by not providing access to a park. A jury ruled in favor of the township, and the plaintiff appealed.

Decision: The appellate court ruled that the jury had ample basis to dismiss the plaintiff's claim based on evidence that, had the plaintiff requested assistance, the township would have responded, enabling him ready access to the park.

Comment: At trial, the plaintiff was confronted with the lawsuits he had filed against other local governments and businesses in New Jersey and elsewhere through the same attorney. His failure to demonstrate a legitimate desire to use the park beyond testing it for ADA compliance combined with the ADA Coordinator's testimony regarding the Grievance Procedure, which the plaintiff did not use, buttressed the township's defense.

Robles v. Domino's Pizza (2019) [189]

Facts: Guillermo Robles, a blind person, sued Domino's Pizza because he was not able to order food through their website. Domino's extensively advertises its website, but its program is not compatible with common screen reading software. Domino's argued that the ADA applies to physical locations and that the Federal Government has not promulgated standards for website accessibility.

Decision: The Appeals court ruled that the ADA also applies to services and products and that the lack of federal standards is not a defense for failure to provide "reasonable accommodations."

Comment: In light of a growing number of website-accessibility lawsuits, local governments should be aware that their websites, just like their buildings, are subject to ADA requirements. We strongly recommend that local governments speak with their attorneys and IT professionals about bringing their website(s) into compliance. [190] It would also be prudent to post a prominent notice on the website to assist the public with accessibility issues, specifically:

> "If you have any trouble with accessing information contained within this website, please contact [insert name of website administrator with telephone number and email address]."

Conclusion

Independent of the risk of lawsuits, New Jersey local governments have a duty to be proactive in making facilities and programs available to people with disabilities. All local governments should appoint an ADA coordinator and conduct an audit to determine where changes in facilities and programs should be implemented. They should also post a code-compliant ADA Notice and establish a code-compliant ADA Grievance Procedure. In the event of a lawsuit, work closely with defense counsel.

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[165] 42 U.S. Code § 12101
[166] Remarks of President George Bush at the Signing of the ADA *(eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html)*
[167] The regulations include an exception for group health plans with fewer than 50 participants that are administered solely by the employer that established and maintains the plan.
[168] *N.J.S.A.* 10:5-4 et seq
[169] 28 CFR § 35.150
[170] 541 U.S. 509, 124 S.Ct. 1978 (2004)
[171] 28 CFR § 35.151
[172] Guidance for navigating the standards may be found at: https://www.ada.gov/regs2010/2010ADAStandards/Guidance2010ADAstandards.htm; The standards themselves may be found at https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf.
[173] *N.J.A.C. 5:23-7*
[174] *N.J.A.C. 13:13-4.4*
[175] Lasky v. Borough of Hightstown, 426 N.J.Super. 68 (App.Div. 2012).
[176] Id., 80-81.
[177] https://www.city-journal.org/html/ada-shakedown-racket-12494.html
[178] https://pdfs.semanticscholar.org/52b3/ff5455b3494ad82f7694300658c4108d5ec0.pdf
[179] 28 C.F.R. pt. 35, § 35.107(a)
[180] https://www.ada.gov/pcatoolkit/toolkitmain.html
[181] 28 C.F.R § 35.106.
[182] https://www.ada.gov/pcatoolkit/chap2toolkit.pdf
[183] 28 C.F.R. § 35.107(b).
[184] https://www.ada.gov/pcatoolkit/chap2toolkit.pdf
[185] Ibid.
[186] 957 A.2d 1172, 957 N.J. 461 (2008)

[187] 426 N.J.Super. 297 (App. Div. 2012).
[188] 425 N.J.Super. 530 (App. Div. 2012).
[189] 913 F.3d 898, 904 (9th Cir. 2019)
[190] While no federal regulations for website compatibility currently exist, courts look to the International Web Content Accessibility Guidelines as providing appropriate website accessibility. Mechanisms may include features such as closed-captioned video, adjustable-size text and document compatibility.

CHAPTER 6

LAND USE LIABILITY

Considering the thousands of applications that Land Use Boards receive each year, lawsuits against them seeking monetary damages are rare. Appeals of land use decisions are usually to the Superior Court for injunctive relief, not monetary damages. "Injunctive relief" is a court order that either requires government to, or prohibits it from, taking action. Delays in winning approvals are a normal part of the process and do not usually give rise to liability lawsuits.

Land Use Boards enjoy the broad immunities extended to governmental decision-makers. Since land use is a judicial function, they also have essentially the same protections from lawsuits as judges. These immunities do not apply when a Land Use Board violates civil rights.

Land use law is based on the fifth amendment of the US Constitution which provides that private property shall not be taken for public use without just compensation. A governmental entity must pay the land owner if private property is condemned for public use.

In 1922, the Supreme Court extended this principle to so-called "inverse condemnation,"[191] where a zoning law or governmental regulation significantly diminishes the value of a private property. While government does not actually acquire ownership of the property, the laws or regulations adopted by the governmental entity effectively make the property worthless.

Under the law, no person has the right to use property in a fashion that threatens public safety or is so obnoxious that it materially impairs the rights of adjacent property owners, however, government does not have the right to adopt regulations that effectively prohibit any reasonable use of private property. Various federal and state laws now give civil rights protection to a range of unpopular uses, [192] including cell towers, group homes and adult bookstores. Monetary damages can be awarded in cases where the applicant's civil rights have been violated. Damages include the applicant's legal fees in these cases, which is why these cases almost always involve large numbers.

There has been extensive litigation in recent years under the Religious Land Use and Institutionalized Persons Act (RLUIPA). [193] A mosque was awarded damages of $7.5 million in one recent case in New Jersey. The act was unanimously adopted by Congress in 2000 and provides that no government shall impose land use regulation that creates a substantial burden on religious exercise, unless in furtherance of a compelling governmental interest, and that it is the least restrictive way of accomplishing that objective. These applications can be very controversial.

Litigation Risk Committee

The Committee should arrange for the training of each Land Use Board member. A professionally recorded training program is available at NJMEL.org.

Selected Case Studies

Schad v. Mt Ephraim (1981) [194]

Facts: The town adopted a zoning ordinance that prohibited adult book stores and theaters in its commercial zone.

Decision: The U.S. Supreme Court overturned this zoning ordinance because it allowed a broad range of other uses in its commercial zone, including book stores and theaters, therefore, the ordinance singled out a particular type of speech, objectionable as it is.

Comment: A few years later, in Renton v. Playtime Theaters (1986),[195] the same Court upheld a zoning ordinance that prohibited adult theaters within 1,000 feet of a residential zone. In this case, the Court ruled that municipalities can take into consideration the higher crime rate around these establishments and use the zoning code to establish a buffer from residential areas, as long as there are still places within the zone where these establishments could be located. Be very careful before adopting any zoning or building regulation that has the effect of singling out any particular type of speech.

Anastasio v. W. Orange (1986) [196]

Facts: An experienced developer received a Superior Court order instructing the town to approve a project after considerable delay. The Planning Board willfully ignored the court ruling and rejected the application. The developer sued both the town and members of the planning board personally. The town settled out of court, and a jury found three members personally liable, awarding damages of $5000 against each.

Decision: Even though they willfully ignored the Superior Court order to approve the application, "discretionary immunity" protects members of a planning board personally from punitive damages. Therefore, the board members were personally immune, but the town was still held liable for their actions.

The Court wrote that:

> "We think that the public interest requires that persons serving on planning boards act with independence and without fear that developers [will] bring them into court."

Comment: Personal immunity will not protect members accused of actions taken in "bad faith," because of corruption or primarily in furtherance of personal instead of public interest. [197]

Whispering Woods v. Middletown (1987) [198]

Facts: The developer filed an action in Superior Court for injunctive relief when the Planning Board rejected a 215-unit application. The Board reached a settlement with the developer in "closed session," subject to a subsequent public hearing. The opponents to the application appealed, arguing that the Board lacked the authority to settle the case so long as the matter was pending in Superior Court and that the closed-door negotiation violated the Open Public Meetings Act.

Decision: The Court ruled that the Board could continue to negotiate a settlement even after the case was appealed to Superior Court and that the Open Public Meetings Act was not violated as long as the agreement was conditional upon a public hearing.

Nunziato v. Edgewater (1988) [199]

Facts: The governing body expressed concern about the impact that a development would have on the town while considering a zoning law change. While there was no legal requirement to make a contribution, the developer volunteered to contribute $200,000 to offset some of these costs.

Decision: The Court ruled that absent a legal requirement, voluntary contributions of this nature are analogous to "pay to play," where favorable land use decisions go to the highest bidder.

Comment: Communities are now required to establish specific requirements for offsite improvements as a result of this case.

Smith v. Fair Haven (2000) [200]

Facts: Members of a Land Use Board visited the site of an application and engaged in discussion with both the applicant and objectors. While most of the discussion was limited to specifics of the application, one Board member further engaged in a heated dialogue with one of the parties. This member was recused from further deliberations.

Decision: The Court agreed that the recusal of the one member who engaged in the heated discussion was an adequate cure in this case. In its opinion, the Court reiterated that discussions at site meetings must not go beyond the arguments and allegations advanced during the course of the Board's meetings and that knowledge gained from the visit should be placed on the record.

Comment: It is good practice to have the Board attorney at on-site meetings.

Tenafly Eruv Association v. Tenafly (2002) [201]

Facts: A group of Orthodox Jewish residents attempted to create an enclosed "Eruv" zone that would allow them to push or carry objects outside their homes on the Sabbath. Eruv's were originally built with ropes and wooden poles, but can be established today by running plastic string high and out of sight between utility poles. The utility company had agreed to allow the "Eruv's," but after a bitter controversy the town decided to stop the plan by enforcing a 1954 town ordinance that prohibits placing signs and the like on utility poles, fences and other public places.

Decision: The Court ruled against the town because it constituted selective enforcement and wrote that officials had ignored numerous other violations in the past, including signs for yard sales, lost animals, house numbers, and church directional signs.

Comment: While all law enforcement is inherently selective, it is illegal to make that selection based on criteria that amount to discrimination.

Mansoldo v. State of New Jersey (2006) [202]

Facts: The owner of an otherwise conforming lot in a single-family zone was prevented from starting construction by the DEP because of flood plain regulations. The DEP ruled that the property could only be used for open space, parkland or a parking lot. The owner sued, arguing that this was "inverse condemnation."

Decision: The New Jersey Supreme Court ruled that in deciding "inverse condemnation" cases, courts must ask if the regulation effectively eliminates all economically productive use of the land. After answering this question, the courts must determine if the regulation unduly interferes with legitimate investment-backed expectations of the property owner, depending on various factors. Based on this analysis, the Court found that "inverse condemnation" occurred in this case. The property owner ultimately sold the two lots to the town.

Al Falah Center v. Bridgewater (2013) [203]

Facts: A Muslim congregation proposed to build a conforming mosque and educational center on the site of a former hotel. Within two months, the Council adopted a revised zoning code that required a church to seek a conditional use variance if located in a residential zone. Things became quite ugly in one of the hearings where no less than 500 citizens attended. The town argued that the area in question had winding roads, and there were other properties where the mosque could locate, although these properties were substantially more expensive. The mosque argued that its consultant found that traffic would not be a problem and that the area already had educational and other similar uses.

Decision: The Federal Court ruled against the town and was swayed by how quickly the Council moved to change the zone. The town paid $2.5 million to purchase another property for the mosque, and the township's insurer paid the mosque's $5 million legal bills.

Muslim Community Association v. Ann Arbor (2013) [204]

Facts: A religious institution applied for variances to build a school in a residential zone. A Board member lived in a nearby development. She coached her neighbors on what questions they should ask at the hearing and did not recuse herself from the deliberations.

Decision: The board member who helped residents draft their objections was not entitled to personal immunity because she acted in bad faith.

Comment: Other examples where immunity did not apply because of bad faith:

- The Mayor asked all members of the Planning Board from his party to vote against a controversial application during a close re-election campaign. It is illegal to influence decisions for political or personal gain. Those phone calls cost the taxpayers hundreds of thousands of dollars. [205]
- A developer submitted a conforming application to build a commercial building that included a daycare center. The Mayor forced the developer to scale-back the application and still voted against it. It subsequently came to light that the Mayor had an interest in another nearby daycare center. [206]

Hartz v. Spring Lake (2018) [207]

Facts: The Plaintiff complained that a house under renovation next door did not conform to the zoning code. The town made several procedural errors during the lengthy proceedings but ultimately required design modifications so that the application was code compliant. The Plaintiff argued that she incurred considerable legal bills because of the procedural errors and sued the town to recover this cost under the New Jersey Civil Rights Act.

Decision: The New Jersey Supreme Court ruled that while the "Zoning Officer did not adhere to the precise statutory procedures… In the end, however, the (Plaintiff) has not established that the Borough denied her the right to be heard before the Planning Board. She therefore cannot demonstrate that she was deprived of a substantive right protected by the Civil Rights Act."

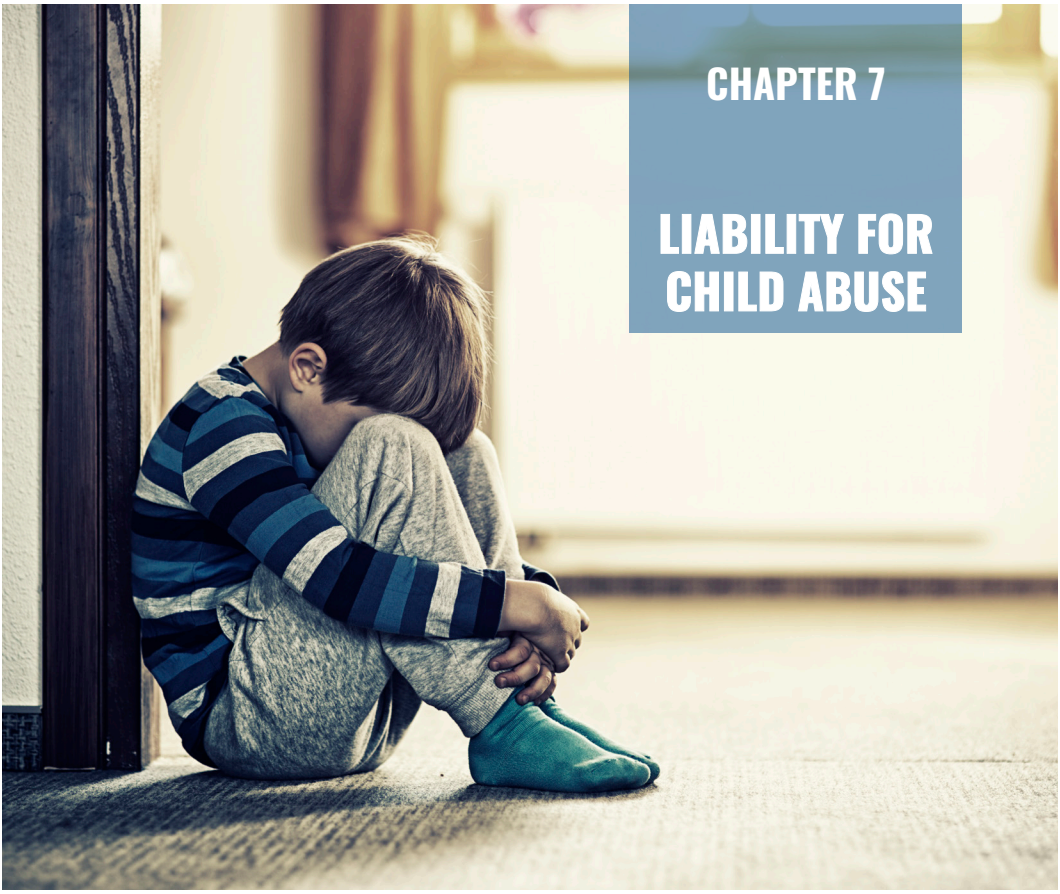
Comment: This was a critical decision because it would be very difficult to operate Planning and Zoning Boards if a municipality was responsible for paying the applicant's legal bills whenever there was a procedural error.

Conclusion

There are several other precautions to reduce the risk of Land Use Liability:

- Do not meet with applicants, or opponents to an application, alone.
- Avoid saying anything that can be construed as biased both at meetings and elsewhere. For example, a Board member said, "We are not going to do anything that is contrary to the wishes of the public" during a contentious hearing. Comments like that make it very difficult to defend the Board in court.

[191] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)
[192] In other words, Not in My Backyard (NIMBY).
[193] *42 U.S.C. 2000cc, et seq.*
[194] 452 U.S. 61 (1981)
[195] Renton v. Playtime Theatres, 475 U.S. 41 (1986)
[196] 209 N.J. Super. 499 (1986)
[197] Muslim Community Association v Ann Arbor, 947 F. Supp. 2d 752 (E.D. Mich. 2013)
[198] 220 N.J. Super. 161 (1987)
[199] 225 N.J. Super. 124 (1988)
[200] 335 N.J. Super. 111 (2000)
[201] U.S. Court of Appeals, Third Circuit, 01-3301 (2002)
[202] 187 N.J. 50 (2006)
[203] 3:11-cv-02397-MAS-LHG (2013)
[204] 947 F. Supp. 2d 752 (E.D. Mich. 2013)
[205] Unpublished settlement
[206] Unpublished settlement
[207] A-48-16 078711 (2018)



CHAPTER 7

LIABILITY FOR CHILD ABUSE

Recent changes in the law have increased the potential liability for both governmental entities and public officials personally regarding child abuse. This issue has rocked many venerable institutions, including churches, sports programs, youth organizations and medical facilities. All local public officials must address this problem as well. Under 2019 legislation, they can be held personally responsible if they fail to act.

Who exactly is considered an abused or neglected child? The short answer is anyone under the age of 18 who is caused harm by a parent, guardian or other person having custody or control of that minor.[208] More specifically, the four common types of abuse are:

- **Neglect:** The failure to meet a child's basic needs, physically, medically or emotionally.
- **Physical Abuse:** The intentional use of physical force that results in injury.
- **Emotional Abuse:** Acts that harm a child's self-worth or emotional well-being.
- **Sexual Abuse:** Engaging in sexual acts with a child, including pornography.

Statistics on Child Abuse:[209]

- Abuse reports involving 80,000 children are filed each year with child protective services in New Jersey.
- 75% of cases involve neglect.
- 18% of victims are physically abused, including sexual abuse.
- Psychological mistreatment accounts for 7% of cases.
- 50,000 children receive prevention and post-response services.
- 37% of all children are reported to child protective services by their 18th birthday.
- 55% of the perpetrators in child abuse cases are females. Males account for the remaining 45%.
- Some 30% of these abused children will later abuse their own children, creating a cycle of abuse that costs a staggering $585 billion each year in the United States alone.

Role of Government

The State takes responsibility for enforcing the law through the New Jersey Family Division Courts in each county seat. These courts have broad powers and can take remedial action, including the removal of children from dangerous situations.

- The Department of Children and Families, especially the Division of Child Protection and Permanency, combines all State operations intended to safeguard children into a single coordinated program that works closely with the Courts and law enforcement.
- The Department of Corrections operates adult prisons and youth correctional centers to deal with perpetrators. Individual counties operate youth detention centers and special purpose schools.

Education professionals at the local level have the most contact with children and are often the first to detect issues. Housing Authorities and municipalities operating recreational programs for children may also come into contact with abused children.

Police agencies assist in resolving reported situations, often acting as the first identifiers. New Jersey law gives police broad authority to protect children, including the authority to remove them from their parents or caregivers without a court order, if necessary, to prevent imminent danger to a child.

Signs of Child Abuse

- Unexplained or unusual fractures, burns, bruises or welts in any stage of healing on a child, particularly in a pattern or grouping that might reflect the shape of the object used.
- The timing of these injuries can be significant, especially if they appear after a weekend or vacation.

A child's behavior can also indicate potential abuse:

- Wariness of adult contact.
- Fear of parents or going home.
- Apprehension when other children cry.
- Extreme behaviors like aggression or withdrawal.

Other indicators include:

- Poor peer relationships.
- Begging for or stealing food.
- Inability to stay awake in class.
- Unwillingness to change for gym or participate in P.E.
- Preferring to remain withdrawn and immersed in fantasy.
- Acting in ways much too adult or too infant for their age.

Child abuse can have long-term effects on victims, commonly including a lack of trust, difficulty with healthy relationships, a core feeling of worthlessness and low self-esteem. There may even be long-term trouble with regulating emotions that can lead to destructive behaviors. [210]

Child Sexual Abuse

Peer-to-Peer is by far the most common form of sexual abuse, where one or more child or adolescent sexually abuses or inappropriately touches another. Legally, the abuser must be at least four-years older to trigger the stature. The American Psychological Association reports that peer-to-peer abuse is driven by power and dominance, the same factors that drive bullying within this age group. Bullying is often a precursor to sexual abuse, especially when there is a lack of supervision.

Adult-to-Child abuse is thought out and planned in advance, demanding access, privacy and control. These three factors demand a very specific type of relationship and setting and 90% of juvenile sexual abuse victims actually know their abuser. The scope of the problem is massive. One in four girls and one in six boys have experienced sexual abuse by age 18.

Of these molestations, 88% are attributed to individuals with pedophilia, defined as the sexual preference for or strong interest in children. It is important not to confuse the attraction of pedophilia with actual child molestation, as many pedophiles never act on their attractions. [211]

Child sexual abusers are not always easy to spot. Though seven out of eight sexual molesters are male, their demographics match the general population in ethnicity, religion, education, and marital status. So, there is no stereotype, especially since abusers go to great lengths to blend in. [212]

Acts of sexual abuse by strangers are very rare. Only 10% of abusers molest children that they don't know, and 68% look no further than their own families for victims. 40% of abusers first begin molesting children before they reach the age of 15 and the vast majority before the age of 20. These teenagers generally begin their acts of abuse on younger siblings. As in other forms of abuse, cyclic patterns are common with 47% of child abusers admitting that they were sexually abused as children. [213]

While most abuse occurs within the family, molesters can also gain access to children through employment or volunteer work with an organization that works primarily with children. These settings provide more opportunity for time alone with potential victims and the ability to build trust and credibility.

Child abusers are often known and respected in their communities for their dedication to children.

When it comes to a victim profile, every child is in danger, but specific characteristics that abusers look for that put some children at higher risk include:

- Passive, lonely or troubled children, especially those who live with step-parents or single parents.
- Children between 7 and 13 years old, the most vulnerable ages.
- Children from low socioeconomic backgrounds or rural areas.

Molesters have behavioral patterns that can be identified as "grooming" their victims. Sexual abuse is rarely violent. The molester's goal is to build a manipulative relationship, which often starts by showing favoritism to build trust.

- Molesters often refer to their intended victims by pet names and use gifts to foster exclusivity and build a relationship while starting the practice of keeping secrets.
- The molester might begin to spend time with the victim outside of the regular program or schedule, contacting parents to become involved in a child's life in some capacity, like babysitting. Many parents are shocked after abuse comes to light because the abuser seemed "too good to be true."
- Inevitably, favoritism is not enough to keep the victim silent and the abuser resorts to threats that often play off of a child's guilt over the sexual contact.

Victims often begin to show tell-tale signs during the grooming process and abuse, including:

- Sexual behaviors or strong sexual language that is too adult for their age.
- Many children feel at fault after the abuse and begin to suffer guilt and depression, even resorting to self-harm.
- Cuts, scratches or other self-inflicted injuries.

Research shows that children often delay reporting sexual abuse. They should not be disbelieved just because they waited a long time to seek help.

Taking Action to Prevent Abuse

As a governmental official, you are legally required to report suspected child abuse. This requirement includes all governmental officials, employees and volunteers. Unlike other states, New Jersey law specifically provides that "Any person having reasonable cause to believe that a child is being subjected to abuse shall report this immediately."

The Department of Children and Families maintains a hotline, 1 (877) NJ ABUSE or 1 (877) 652-2873, to report child abuse. Failure to report is a misdemeanor and could expose you to a lawsuit for damages. Fortunately, any person who, in good faith, reports suspected abuse or testifies in a child abuse hearing is immune to any criminal or civil liability that may result. You can also choose to report anonymously.[214]

When dealing with a child who might be abused, show calm reassurance and unconditional support[215] by:

- Avoiding interrogation and leading questions. Let the child explain in their own words. Anything else could confuse and fluster a child, making it difficult to continue.
- Understanding that denial is a common reaction. Be reassuring. Displaying disbelief, shock or disgust will shut-down the conversation with the child quickly.
- Ensuring that the child knows that they did nothing wrong, that this is not their fault and that you take it seriously.
- Contacting the appropriate professionals or agencies as soon as possible if there is the chance of violence against yourself or the child.

Personal Liability

The term "In Loco Parentis" is a legal doctrine that grants an individual or organization responsibility to act in a child's best interest. This makes individuals or organizations, including schools, daycare centers, recreational programs and custodial correction facilities, liable if the child is harmed while under their supervision.

The legislature has extended the statute of limitations in the case of child sexual abuse to age fifty-five, or later under some circumstances. This change means that officials who fail to implement reasonable controls can be sued personally, years or decades after they leave office.

Your governmental entity probably has arrangements for your defense and indemnification. However, you should talk with your municipal, board or authority attorney to understand exactly how these procedures work. See Chapter 8 for a discussion of insurance coverage and indemnification.

Litigation Risk Committee

All governmental entities must have policies and procedures to deal with child abuse. A model policy and procedure can be found at NJMEL.org.

Background Checks: An effective program to protect children must start with a background check. Written documentation of these checks should be kept for at least 65 years. Background checks for all prospective employees and volunteers should include:

- Fingerprint identification.
- Personal and professional reference checks.
- The Megan's Law directory for New Jersey and any other state in which the applicant has lived.
- Any negative or questionable results must be dealt with before the individual is hired or begins to work with minors, and no provisional hiring should be permitted.
- An annual re-check of Megan's Law directories should be done to ensure no current employees have been added to the list.
- Employees should be required to notify the appropriate Human Resources representative within 72-hours if there is an arrest or conviction.

Training: Everyone must be trained, beginning with elected officials, and records of all training should be maintained for at least 65 years. The MEL provides a complete package of special training programs for:

- Managers and Supervisors.
- Police Command Officers.
- All other Employees and Volunteers.

Volunteer coaches must also complete the Rutgers SAFETY Clinic Course that provides partial civil immunity under "The Little League Law."

Other Policies and Procedures

- A written protocol for notifying the parents or guardian of a minor in case of an emergency, whether a medical, behavioral, natural disaster or other disruption.
- Medical treatment authorization forms.
- A policy that forbids the release of children to anyone other than the parent, guardian or other authorized adult.
- Policies that prohibit staff or volunteers from transporting children in their own vehicles without written authorization. Police agencies also must adopt specific procedures for the transportation of minors.
- Strong policies forbidding staff and volunteers from meeting with a child alone and in private.
- Guidelines that restrict images taken of children as part of an activity from being shared on social media or any other platform without expressed consent from parents or guardians.
- Anti-Hazing and bullying policies that cover cyberbullying.
- Procedures for the monitoring of bathroom facilities.

Prevention of Domestic Violence Act [216]

Police also have broad authority to protect people age 18 and over who are subjected to domestic violence. This is important because children are often victimized in households where domestic violence occurs against spouses and others. Under the Prevention of Domestic Violence Act:

- A law enforcement officer must make an arrest when they find "probable cause" that domestic violence has occurred. This holds even if the victim refuses to make a complaint.
- The Act is invoked in situations where the victim exhibits signs of injury caused by domestic violence, when a warrant is in effect or when there is probable cause to believe that a weapon has been involved in an act of domestic violence.
- If a child is present, the officer must report the situation to the Department of Children and Families for further investigation. Domestic violence is not just about physical assault. Abusers often psychological tactics to gain control over their partners, including making threats to prevent a victim from leaving or contacting friends or the police.

- If these conditions are not met, an officer may still make an arrest or sign a criminal complaint if there is probable cause to believe acts of domestic violence have been committed. If there is no visible sign of injury, but the victim states that an injury occurred the officer must consider other factors in determining probable cause.

Selected Case Law:

J. H. v. Mercer County (2007) [217]

Facts: A 24-year-old female detention center employee started a sexual relationship with a 17-year-old inmate at a county detention center. He was a very troubled young man who entered treatment with another Agency after he turned 18 and was released from the county facility. A lawsuit was filed to recover the medical bills. The county argued that while the molester can be held liable, the county itself has immunity from vicarious liability under *Title 59*.

Decision: The Court ruled that both the county and the employee could be held liable. Further, under recent legislation, the County Board of Freeholders can now be held personally liable for failure to implement appropriate safeguards.

S. P. v. Newark (2012) [218]

Facts: A police officer responded to a boarding house where one tenant claimed that another tenant had groped her. The Prevention of Domestic Violence Act [219] specifically mandates arrest where the officer finds that the victim exhibits signs of injury, there is a restraining order or warrant or a weapon was used. However, the officer did not realize that there was a previous restraining order and did not consider mere groping to be an injury. He did not make an arrest, and later that day, the woman was raped by the other tenant. She sued, alleging that her injuries were caused by the officer's failure to arrest the assailant under the Act.

Decision: The Court ruled that while the officer was required to act upon finding any of the statutory triggers, the initial determination is still discretionary and, therefore, qualified for police immunity.

Schmotzer v. Rutgers (2017) [220]

Facts: An 18-year-old member of the Rutgers' Woman's Volleyball Team alleged that she was coerced into a relationship by the coach and that the university acted with deliberate indifference. Two years later, she quit the program and sent an e-mail complaining of an "uncomfortable" environment within the program but not specifically mentioning the sexual coercion. The Athletic Director never followed up and two years later, she sued.

Decision: The Court ruled that the athlete waited too long to bring the lawsuit. The statute of limitations for someone 18 or older was two years at that time.

Comment: Under recently enacted legislation, the statute of limitations for an adult sexual abuse victim is now seven-years.

L.E. v. Plainfield BOE (2018) [221]

Facts: A girl was pushed into the boy's bathroom where she was sexually assaulted. The lawyers for the Board argued that while, under *Title 59*, the perpetrator of a crime can be sued, the public entity itself has an immunity for failure to provide adequate police protection.

Decision: The Court held in favor of the plaintiff, ruling that Boards of Education have a duty to implement reasonable measures to prevent student-on-student assault, including the enforcement of a system of hall passes, maintaining supervision of students in class and preventing free-entry into school buildings.

G.A.H v. K.G.G (2019) [222]

Facts: A 44-year-old privately-employed EMT had a sexual relationship with a 15-year-old girl. He told a co-worker about the relationship, but not her age, and showed the co-worker pornographic photos of her on his cell phone. He also drove the young woman in the ambulance on occasion, although the relationship itself did not happen during working hours. After five months, the teen informed her mother, who then notified the police. The molester pleaded guilty and was jailed. Four years later, the girl sued, alleging that the molester's co-worker should have reported the situation to his supervisors and that the employer was vicariously liable for negligent hiring, training and supervision.

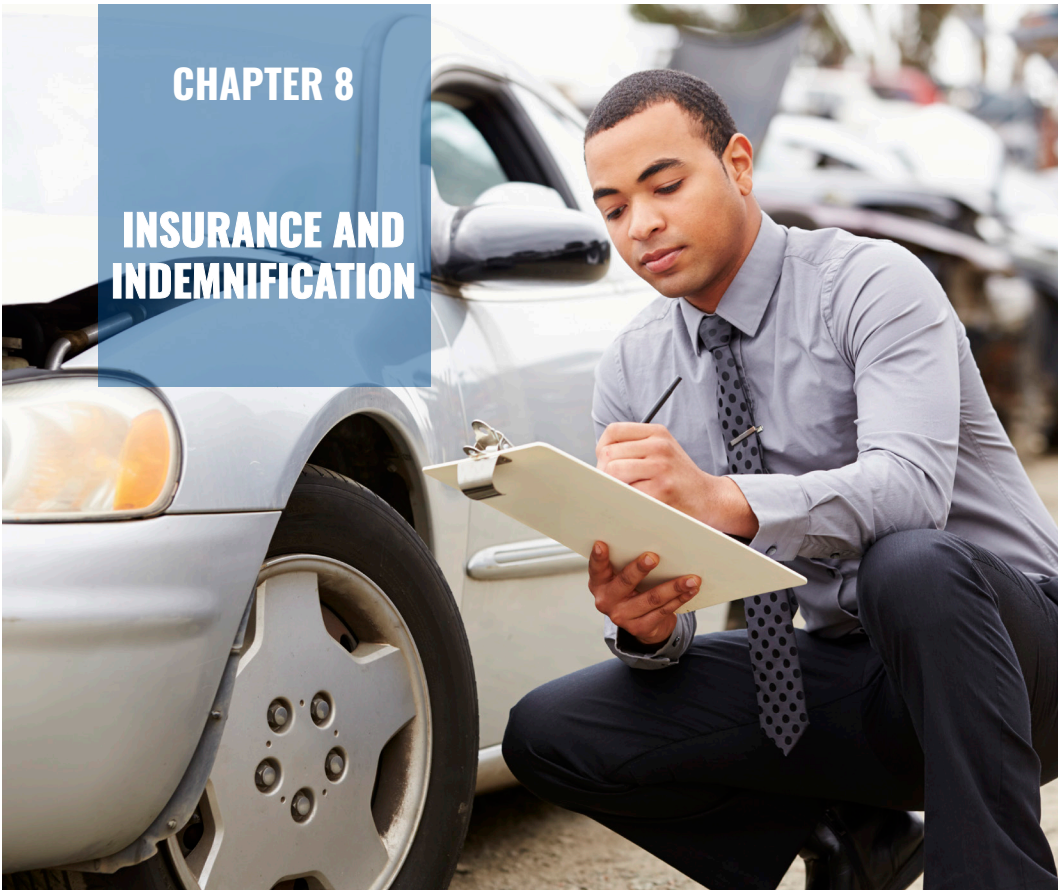
Decision: The New Jersey Supreme Court ruled that the facts did not create a reasonable basis for the co-worker to believe that his colleague was in a sexual relationship with a minor. The Court pointed out that it is often difficult to know someone's age based on appearance alone, especially on the small screen of a cell phone.

Comment: The Court also ruled that "We need not decide whether a co-worker or employer with knowledge that a co-worker or employee is engaged in a sexual relationship with a minor has a legal duty to report that co-worker or employee." Thus, they left this issue open for a later case. If this was a public entity, however, knowledge or reasonable suspicion creates a duty to report.

[208] *N.J.S.A. 9:6-1*
[209] U.S. Dept of Health and Human Services, Child Maltreatment, 2017
[210] Smith, Melinda, Robinson, Lawrence & Segal, Child Abuse and Neglect, Santa Monica, 2019
[211] Deeger, Alice, What can be done about pedophilia? The Atlantic, 2013
[212] Etikk, Praksis, The Ethics of Pedophilia, Oslo
[213] Abel, Gene & Harlow, The Stop Child Molestation Book, revised 2002
[214] *N.J.S.A. 9:6-8.13*
[215] Smith, Melinda, Robinson, Lawrence & Segal, Child Abuse and Neglect, Santa Monica, 2019
[216] *N.J.S.A. 2C:25-17 et seq.*
[217] 396 N.J. Super. 1, 930 A.2d 1223 (2007)
[218] A-5591-10T3 (2012)
[219] *N.J.S.A. 2C:25-17 et seq.*
[220] U.S. District Court, Civil Action 15-6904 (2017)
[221] A-3638-16T1
[222] 455 N.J. Super. 294 (2019)

PART 3

INSURANCE



CHAPTER 8

INSURANCE AND INDEMNIFICATION

The discussion in this chapter is general in nature and is not a binding insurance policy and should not be used as an insurance policy.

Local governments, their officials and employees enjoy broad immunities to protect them from liabilities. There are limits to these immunities. This chapter discusses the role of insurance and other forms of indemnification when the immunities do not apply.

Insurance coverage issues can be complex and very fact sensitive. It is important that local governments retain a knowledgeable Risk Manager for advice. Holes in coverage can also occur if the terms and conditions of individual policies are not coordinated. Therefore Joint Insurance Funds (JIFs) generally require members to join for all lines of insurance to minimize these gaps.

Local elected officials enjoy all of the immunities and protections afforded to governmental employees and are considered employees even if they are not paid. The only practical difference between an elected official and any other governmental employee is that officials first elected after July 1, 2007, are no longer eligible to join the regular pension plan but may join the defined contribution plan.

Some volunteers are also covered by the property and casualty insurance policies, specifically, volunteer firefighters, first-aid workers and reserve or auxiliary police officers. [223]

Non-emergency volunteers may also be covered for most of the local government's insurance except workers' compensation, depending on the circumstances. Check with your local government's Risk Manager to determine the coverage for volunteers.

- **Governmental Volunteers:** The policies usually cover volunteers for any organization that is "controlled" by the local government **and** subject to the Fiscal Affairs Law [224] and Public Contracts Law. [225] However, independent utility, housing and other "authorities" that adopt their own budgets usually have their own policies.

- **Non-Profit Volunteers:** Some local governments include in their insurance programs non-profit organizations that perform functions commonly administered by local governments. The most common of these non-profits are Recreation Associations. Coverage is not automatic and is subject to special application and reporting procedures. [226]

When is an official, employee or volunteer "on-duty?"

As a general principle, a local government's insurance policies and indemnification procedures only apply if the official, employee or covered volunteer is "on-duty," meaning that all of the following are met: [227]

- The individual was acting in a matter in which the local government has an interest.
- The individual was acting in the discharge of a duty imposed or authorized by law.
- The individual was acting in good faith.

Career and volunteer first responders are considered to be "on-duty" even when they respond to an emergency that happens in their jurisdiction outside of normal duty hours, and are not specifically called out. They are also considered to be "on-duty" if they come upon an emergency outside their regular jurisdiction. First responders are not covered in other situations if they respond "off-duty" without proper authorization.

Electioneering in not covered because it is not in the discharge of a duty. It is illegal for an employee to campaign while "on-duty." For the same reason, election opponents who sue each other for defamation will not be protected by their local government because they are not "on-duty" while campaigning.

Workers' Compensation Insurance

Workers' Compensation represents half of the cost of property-casualty insurance for the typical local government. The law mandates coverage for on-the-job injuries and occupational illness on a "no-fault basis" for all employees and certain volunteers (See Chapter 1). The Workers' Compensation Act also requires all employers to demonstrate their ability to provide for their financial responsibilities to injured employees by either purchasing an insurance policy from an approved insurance company or qualifying with the New Jersey Department of Insurance as a self-insurer. [228] Governmental entities in New Jersey are not required to seek approval to self-insure and have the additional option of joining a Joint Insurance Fund, [229] which results in considerable cost savings.

Almost all workers' compensation policies have statutory limits, which means that they cover the employer's obligations under the Act without a limit. The policy's purpose is to protect the employee, even if the employer becomes insolvent or is otherwise no longer able to meet its statutory obligations. A governmental entity is still responsible to pay all claims due under the Act if it decides not to purchase coverage.

Liability Insurance

Liability claims represent 40% of the cost of property-casualty insurance for local government. This coverage typically consists of eight primary insurance policies, many provided by the same insurer. Note that the insurers at the excess level are usually different.

Liability Coverage	Insurer
General Liability	Primary Casualty Insurer
Automobile Liability	Primary Casualty Insurer
Police Professional Liability	Often the Primary Casualty Insurer
Public Officials	Specialty Insurer
Employment Practices Liability	Specialty Insurer (See Chapter 11)
Environmental Liability	Specialty Insurer (See Chapter 12)
Cyber Liability	Specialty Insurer
Aircraft Liability	

- In many programs, including the MEL, the Primary Casualty Insurer covers both Workers' Compensation and Liability.
- All of these policies have an "other insurance" exclusion to avoid duplication. Under this clause, an insurer will not cover what is normally insured under another coverage, even if the local government decided not to purchase the other policy.
- These policies do not cover liabilities assumed under contracts unless there is a special provision to include these specific liabilities. It is good practice to ask your Risk Manager to review all significant contracts.
- The policies usually do not cover lawsuits for injunctive relief; in other words, a lawsuit that demands that the governmental entity does something or stops doing something. Generally, insurance policies only cover claims for monetary damages and are not meant to be a substitute for the general legal budget.
- While General Liability policies cover defamation under limited circumstances, they exclude lawsuits between officials, employees and volunteers. For example, suppose two elected Council Members get into a shouting match at a meeting and sue each other for defamation; in that case, they cannot look to the policies for defense and indemnification.
- The insured has a duty to cooperate in defending the claim. Deliberate failure to do so can nullify coverage.
- Liability policies do not cover punitive and similar damages.

In addition to paying judgments and settlements, liability insurance policies also pay the cost of defense. The insurer usually has the right to select the attorney who will provide this defense.

In the case of Joint Insurance Funds, the process to select defense attorneys begins with a periodic request for competitive proposals released by each Fund Attorney. After reviewing the responses, the Fund Attorney recommends a panel, appointed each year by resolution of the Commissioners at their January reorganization meeting. After the panel is selected, individual cases are assigned to defense attorneys by the Fund Attorney, or by the insurer in the case of the specialty insurance coverages.

- The duty to defend applies to only those causes of action that would be covered if the claim was valid. [230]
- When multiple causes of action are stated, the duty to defend continues until every covered claim is eliminated. [231]
- Where an insurer exercises full control of the claims settlement process, the insurer has a duty to exercise good faith in settling claims. [232]
- An insurer has no duty to reimburse an insured for defense costs incurred before the insured reports the claim. [233]
- Policies do not cover defense costs for criminal matters, even if you are acquitted.

Special Liability Reporting and Coverage Requirements

Joint Insurance Funds and insurers commonly require precautions before insuring dangerous activities. Seek the advice of your Risk Management Consultant.

- **Special Events:** Local governments become involved in a wide range of special events, including parades, community picnics and fairs, marathons, craft festivals and concerts. These events require careful planning to minimize legal exposures. A guide concerning the risk management issues associated with special events is available at NJMEL.org.
- **Fireworks Displays and Amusement Rides:** The JIF or insurer must approve the contract with the display or ride provider prior to the event. The provider must execute a hold harmless agreement and attach certificates of insurance for Workers' Compensation, General Liability and Auto Liability. The MEL has established minimum policy limits and a standard reporting form. Refer to the applicable Coverage Bulletin at NJMEL.org for full requirements.
- **Skateboard Facilities:** For a skateboard facility to be included in your insurance program and qualify for design immunity, it must be designed by a qualified architect or engineer, and the governing body must approve the plans before construction can begin. Complete requirements can be found at NJMEL.org.
- **Employed Attorney Professional Liability:** Most attorneys that represent local government are in private practice and are required to obtain their own professional liability insurance. Local governments may secure an attorney's professional coverage as a part of the organization's insurance only if the attorney is a full-time employee of the governmental entity, as opposed to a law firm. The JIF must approve the application for coverage before coverage is granted. Refer to the applicable Coverage Bulletin at NJMEL.org.

Automobile Insurance

Local government is subject to the same auto liability laws as other vehicle owners. Police and firefighters have special immunities while responding in good faith. As in the case of workers' compensation, New Jersey law requires all vehicle owners, except government entities, to demonstrate their ability to provide for their financial responsibilities by purchasing insurance or by qualifying with the Department of Banking and Insurance as a self-insurer. Governmental entities are not required to seek approval to self-insure and have the additional option of joining a Joint Insurance Fund.

Auto policies insuring local governments include all vehicles that are owned, leased or borrowed, including vehicles not specifically listed in the policy. The policy covers all permitted drivers, even if the driver is not named in the policy. It also provides excess limits for all vehicles owned by others while being used on governmental business. For example, if the building inspector has an accident while driving a private car on official business, the inspector's policy covers the accident until the limits are exhausted. At that point, the local government's policy is triggered.

As indicated in Chapter 1, the courts have ruled that an employee is only covered by workers' compensation while on the employer's business. There is no coverage under workers' compensation if the employee is on personal business when an auto accident occurs even if the employee is driving an employer-owned vehicle. [234] However, in this situation, the employee and any passengers are eligible for Personal Injury Protection (PIP) by both the employer's and the employee's auto insurance policies. An employee is also covered by workers' compensation if an accident occurs while operating a privately-owned vehicle on the employer's business.

Indemnification Ordinances

An important tool to further protect officials, employees and volunteers is to adopt an indemnification ordinance. *Title 59* [235] provides:

> "Local public entities are hereby 'empowered' to indemnify local public employees consistent with the provisions of this act. A local public entity may indemnify an employee of the local public entity for exemplary or punitive damages resulting from the employee's civil violation of State or federal law if, in the opinion of the governing body of the local public entity, the acts committed by the employee upon which the damages are based did not constitute actual fraud, actual malice, willful misconduct or an intentional wrong."

Note that local public entities are empowered to indemnify, while the equivalent provisions for state and school employees require indemnification. There have been cases where a municipal or county official was denied indemnification because the opposite party had control of the council. Like all actions of a local public entity, the governing body's decision is subject to being overturned if shown to be arbitrary and capricious. In other words, you cannot indemnify one official and not another under similar circumstances.

There are special statutes that require indemnification of police officers and municipal Clerks under some circumstances. The subject of indemnification was discussed extensively in the recent case of Zirkle v. Fairfield. [236]

The Resource section of this manual includes a model indemnification ordinance with several optional provisions. The difference between the provisions is that one allows indemnification for punitive damages at the governing body's prerogative, while the second prohibits indemnification for punitive damages. In light of the long statute of limitations for some personal liability exposures against officials, employees and volunteers, the governing body should consider adopting the broader version of the indemnification.

Homeowner's Policies

Standard homeowner's or personal umbrella policies often exclude coverage for officials while performing their official duties. Talk to your personal insurance agent about policies specifically designed for public officials. It is always a good practice to immediately report any potential claim.

Property Insurance

Property losses represent approximately 10% of the cost of property-casualty insurance for local government. While each property insurance policy has different terms, the policy is generally only triggered when there is a physical loss to property caused by a covered peril. Coverage issues are technical and local governments should seek the advice of a qualified Risk Manager. The following is a list of coverages usually included in the standard policy. Many of the exclusions can be covered by special policies.

Most Common Perils

- Fire, including arson.
- Flood, windstorm, lightning and other weather-related events.
- Motor vehicle collisions and other damage.
- Failure of mechanical and electrical equipment.

Perils Not Covered

- Flood within the flood hazard zone.
- Wear and tear, along with faulty construction.
- Pollution, disease and pathogens.
- Theft by officials, employees or volunteers.

Types of Property Covered

- Buildings and contents.
- Mechanical and electrical equipment.
- Motor vehicles, including emergency vehicles and attached emergency equipment.
- New construction and buildings under renovation.
- Outdoor property, including light poles, signs and benches.
- Synthetic turf fields.
- Computer equipment.
- Waterborne features, including boardwalks, piers and docks.
- Valuable papers and records.

Types of Property Not Covered

- Land, beaches and related improvements, including sidewalks, roadways and greenery.
- Sanitary and storm sewers.
- Watercraft and aircraft.
- Personal property and personal vehicles owned by others, including employees.
- Electronic data, programs and software.
- Money and securities.

Coverage Considerations

- **Natural Catastrophes:** The largest losses under the property policy are natural catastrophes, including flood, storm surge, wind, hail, lightning and earthquake. While policies usually have significant coverage sub-limits for these exposures, amounts not covered by insurance are often reimbursed by the Federal Emergency Management Agency (FEMA). Flood coverage in high hazard zones, including Zones A and E, has a much higher deductible that corresponds to the limits available from the National Flood Insurance Program (NFIP). A local government that fails to purchase available NFIP coverage may find itself responsible for a considerable portion of the loss.
- **Vehicles:** The property policy also covers damage to vehicles owned or leased by the insured local government. The policy does not cover damage to vehicles owned by employees or volunteers, even if being used on official business at the time of the accident.
- **Boiler and Machinery:** This specialized insurance is now rolled into the property policy to avoid coverage gaps. Boiler and machinery insurance also covers such "objects" as heating and air conditioning units, generators, electrical equipment and large motors. Safety inspections required by state law are a significant aspect of this coverage.
- **Newly Acquired Property:** While the policy automatically covers most newly acquired property, there are exceptions, such as vacant buildings. It is good practice to report all acquisitions and disposals to the Risk Manager because each insurer has different requirements.
- **Valuations:** Insureds are required to update their property listings and valuations annually. Property is usually valued at "replacement cost," which means the insurer will pay to repair or replace the damaged property with "like kind and quality." Property valued at "replacement cost" will only receive this higher settlement if it is actually repaired or replaced. Otherwise, the insured will receive "actual cash value," which means "replacement cost minus actual depreciation." Some properties such as non-emergency vehicles and vacant buildings, are usually insured for "actual cash value." Many vacant buildings are only insured for debris removal where the insured intends to demolish the structure to make way for open space or a new building.
- **Historic Buildings:** Structures on federal or state historic registries may be insured for special replacement cost that contemplates the materials and special contractors to repair or replace these buildings. The higher valuation must be reported to be eligible for this coverage. Otherwise, the insurer is only responsible to repair or rebuild with modern materials. For example, if a historic town hall is destroyed, the insurer will replace it with a modern building unless it has been valued as a historic structure.
- **Errors in Valuations:** Inadvertent failure to list a property or mistakes in valuations will not impact claim settlements unless the error was intentional. Failure to report and value certain special risks in the case of special properties such as dams, bridges, historic buildings and vacant buildings will nullify this "errors and omissions" clause.
- **Pollution:** Damage caused by pollution is not covered by the property policy, but may be covered by the local government's pollution insurance (see Chapter 10).

- **Contamination:** Most damage caused by contamination is not covered, including mold, mildew, fungus, bacteria, virus, pathogens and other pollutants and pathogens. However, there may be coverage if a "preceding covered loss" caused the contamination. For example, mold in the attic is not covered unless caused by a roof leak that was the result of an otherwise covered windstorm or lightning strike.
- **Faulty Work:** Damage caused by faulty work is not covered, but the policy may cover "ensuing loss." For example, the policy will not pay to repair a support beam that was cut to the wrong size, but may pay to repair other damage caused when the faulty beam fails.
- **Corrosion, Wear and Tear:** While "depletions" over time are not covered, the "ensuing loss" coverage may apply depending on the facts. For example, if an old pipe bursts, the insurance will pay for the subsequent water damage but not the replacement of the pipe itself.
- **Builder's Risk:** The policy covers buildings while under construction. Depending upon the circumstances, coverage for "builder's" risk may require prior approval. Check with your Risk Manager for reporting requirements.
- **Business Interruption and Extra Expense:** If property is unusable because of a covered loss, the policy will also pay the extra expenses incurred to maintain operations during a reasonable restoration period. The policy will also reimburse any lost profits if the damaged property was income-producing, such as an apartment building owned by a housing authority. However, business interruption and extra expense only apply to losses to covered property. This coverage will not reimburse a municipality for lost tax revenue caused by the destruction of buildings not otherwise covered by the policy, nor for lost beach revenue because sand is not covered property. While these losses are not covered by insurance, they are often reimbursable by FEMA.
- **Underground Piping:** Sanitary and combined sanitary/storm sewers are not covered. Other types of underground piping, including storm sewers, may be insured within a 1,000-foot radius of covered buildings or structures. The policy does not pay for excavation costs to identify the cause of damage unless such investigation determines the cause of damage to be covered in the policy.
- **Fine Arts:** Individual JIFs have special policies concerning the reporting and coverage of fine arts.

Crime Policies

Property policies exclude coverage for monies and securities as well as theft by officials, employees and volunteers. The crime policy covers these exclusions. Another key coverage is "Social Engineering," where a criminal dupes the local government into voluntarily releasing assets. The most common tool is a fake e-mail that looks to be from a legitimate source for a sound purpose.

Statutory Bonds: The crime policy also provides the faithful performance bond required by the Municipal Treasurer or Chief Financial Officer performing duties of the Treasurer, Library Treasurer, Utility Collector and Tax Collector. These bonds protect the local government if the official steals or misappropriates public funds. *NJAC 5:30-8* provides tables of bonding levels based on the entity's revenue. The auditor will advise of the levels required for the various positions. The Risk Manager must be kept informed to make sure the limits are adequate.

To underwrite these positions, the MEL requires the following information every three years:

- Completed Statutory Bond application.
- Credit score of 600 or above.
- No pending bankruptcies, insolvencies or similar financial conditions, including in any organization where the applicant has at least 10% ownership.
- Completed FCRA Consumer Disclosure and Authorization form.

Should the individual not be automatically approved, there is an appeal process to a panel comprised of the three senior-most MEL Commissioners. The appeal must include the individual's explanation of the situation and a letter of recommendation from the member employing the individual.

Litigation Risk Committee

The Risk Management Consultant is responsible to report on the insurance program periodically. Most JIFs strongly encourage Risk Managers to attend the monthly JIF board meetings and become involved in the standing committees. Their involvement has been a significant factor in the success of the JIFs.

The Risk Manager is also responsible to review contracts for issues with the indemnification and insurance provisions. Vendors and service providers frequently insert language that puts local government at risk in the event of vendor non-performance or claims caused by vendor negligence. See the Resources section of this manual for model insurance and indemnification guidelines. Also check with your Risk Manager and JIF Fund Office for other recommendations developed by your JIF.

Selected Case Law:

Rova Farms Resort v. Investors Insurance (1974)

Facts: A guest at a resort was severely injured when he jumped off a diving board into murky water. Attorneys for the resort urged the insurance company to settle the case, but the insurer decided to take the matter to the jury hoping that the award would be less than the policy limits. The jury awarded the injured guest substantially more than expected, and the resort had to pay the difference. The resort sued the insurer, alleging bad faith.

Decision: The New Jersey Supreme Court ruled that where an insurer reserves full control of the claims settlement process, the insurer has the duty to exercise good faith. By ignoring the insured's attorneys, the insurer became responsible for the amount that the jury award exceeded the policy limits.

Golaine v. Cardinale (1976) [237]

Facts: A Mayor declared that a Planning Board member who requested temporary leave had, in fact, vacated the seat and then appointed a new member to the board. The now ex-member sued the Mayor, alleging that the removal was improper and the Court agreed. The member was reinstated, then sued the Mayor and the town for reimbursement of the legal fees incurred while winning reinstatement.

Decision: The Court ruled that the town was not required to pay the Board member's fees because they were incurred by the member to secure reinstatement to a political position. Therefore, the Board member was not "acting in the discharge of a duty imposed or authorized by law." Government does not pay the legal expenses of individuals involved in election disputes for the same reason.

Comment: Appeal Court Judge Sylvia Pressler's decision in this case is often cited.

Werner Industries v. First State (1988)

Facts: Werner Industries purchased a primary liability policy with a $500,000 limit from one insurer and an excess policy from a second insurer. The first insurer became insolvent, and the Guarantee Fund only provided $300,000 in coverage. Werner contended that even though the language in the second policy was clear that coverage only started when the claim exceeded $500,000, the excess policy should start coverage at $300,000 in this case because Werner had a reasonable expectation that there would be no gap between the primary and excess policies.

Decision: The New Jersey Supreme Court ruled against Werner Industries. If an insured's reasonable expectations contravene the plain meaning of a policy, the plain meaning can only be overcome if the policy is inconsistent with public expectations and commercially accepted standards.

Comment: This is an important decision that reaffirmed that the Courts are not inclined to re-interpret clear policy language for the benefit of either the insured or the insurer.

SL Industries v. American Motorists (1992) [238]

Facts: A 62-year-old employee was told that his position was eliminated and encouraged to take early retirement. The position was filled again several months later with a younger employee. The "early retiree" sued and the employer directly defended the claim for two years without conveying sufficient information to its insurer to trigger coverage. The employer sued the insurer for reimbursement of approximately $100,000 in legal expenses incurred during that two-year period.

Decision: The New Jersey Supreme Court ruled that an insurer has no duty to reimburse an insured of defense costs incurred by the insured before the insured sufficiently reports the claim to trigger coverage.

Comment: This case highlights why it is important for local government to work closely with its Risk Manager to comply with claim reporting procedures.

Loigmann v. Monmouth County (2000) [239]

Facts: A prosecutor was held liable in a defamation action filed by an assistant prosecutor who was awarded punitive damages. The governing body paid the prosecutor's defense costs and the award. A citizen sued, contending that the governing body's actions were not authorized under *Title 59*.

Decision: The Freeholders were within their rights to defend and indemnify the prosecutor. *Title 59* permits broad discretion in deciding whom to indemnify and under what circumstances, so long as the decision is not arbitrary and capricious.

Comment: As previously indicated, governing bodies should seriously consider adopting an ordinance that establishes indemnification and defense policies.

McCurrie v. Kearney (2002) [240]

Facts: There was a change in party control, and the Clerk, who was closely associated with the outgoing administration, negotiated a severance package with the incoming governing body. A citizen sued to block the agreement, and the Clerk hired an attorney to defend their interest in the lawsuit. The town agreed to pay the Clerk's legal bills, which the citizen then argued was improper. The Appellate Court agreed with the citizen on the grounds that Clerks have a special indemnification statute that is not broad enough to cover the Clerk's legal costs in this case. The matter then went to the New Jersey Supreme Court.

Decision: The New Jersey Supreme Court overturned the Appellate Court and ordered the payment of the Clerk's legal bills. The Court agreed with the Appellate Court that the special statute concerning Clerks did not cover the legal costs, but then ruled that the governing body could still pay the bills under the broader indemnification language in *Title 59*.

Comment: This decision is an excellent discussion of the interrelationship between the various laws on indemnification.

Election Law Enforcement Commission v. James (2015) [241]

Facts: A Mayor with a substantial political "war chest" learned that he was the subject of a criminal investigation for the misuse of his office. He retained a lawyer and used surplus from his campaign fund to pay the bills. He argued this was permissible because the regulations specifically permit campaign funds to be used for legal bills related to holding office.

Decision: The Court ruled that while surplus contributions may be used for the reasonable legal fees that directly arise from the campaign or the duties of holding office, defense costs for criminal defense are considered a personal expense and may not be paid from political contributions.

Ferentz v. Frederick (2019) [242]

Facts: A policewoman sued for damages after she was fired for cause. When her boyfriend was elected Mayor, the Council reinstated and promoted her to Chief. Over the warning of the insurer, the Council adopted a resolution exonerating the now Chief, making it all but impossible to defend the previous Mayor. The insurer then disclaimed coverage to the town but continued to defend the former Mayor. A jury awarded the Chief a seven-figure sum, and the town sued the insurer to pay the award.

Decision: The Court ruled that the actions of the new Mayor and Council violated their duty to assist in the defense and, therefore, nullified coverage. While the governing body was within its right to reinstate the policewoman, the resolution went too far.

[223] *N.J.S.A. 34:15-43*
[224] *N.J.S.A. 40A:5-1 et. seq.*
[225] *N.J.S.A. 40A:11et. seq.*
[226] See the applicable coverage bulletin at NJMEL.org.
[227] Golaine v. Cardinale, 142 N.J. Super. 385 (1976)
[228] *N.J.S.A 34:15-79*
[229] *N.J.S.A.40A:10-36*
[230] Burd v. Sussex Mutual, 267 A.2d7 (1970)
[231] Mt Hope Inn v. Travelers Indemnity, 384 A2d 1159 (1978)
[232] Rova Farms Resort v. Investors Insurance, 323 A.2d 495 (1974)
[233] SL Industries v. American Motorists, 607 A2d 1266 (1992)
[234] Chisholm v. Ocean County (1989)
[235] *N.J.S.A. 59:10-4*
[236] Unpublished decision
[237] 142 N.J. Super. 385 (1976)
[238] 607 A2d 1266 (1992)
[239] 329 N.J. Super. 561 (2000)
[240] 344 N.J. Super. 470 (2002)
[241] A-0726-12T4 (2015)
[242] A-5628-17T2

CHAPTER 9

MANAGING A JOINT INSURANCE FUND (JIF)

Since the mid-1980s, the risk management revolution for governmental entities in New Jersey has been led by the 19 JIFs that created the Municipal Excess Liability Joint Insurance Fund (MEL). The MEL organization has reduced its members' property/casualty costs by at least half and member employee accident rates by over 65% since its inception. MEL non-claim costs have simultaneously been cut to the lowest in the country. The average non-claim cost for MEL member JIFs is 15%, compared to 31% for commercial property/casualty companies.

JIFs are governmental entities that are governed by member appointed commissioners. The commissioners make all decisions and go considerably beyond commercial insurers to provide service to the members. Examples include:

- When the MEL was first established, a major Reinsurer offered a lower property insurance rate if the program did not include the shore communities. Joseph Giorgio, Manager of Hanover Township (Morris JIF) and the MEL's first Chairperson, flatly rejected the idea, stating that all of the JIFs must look out for each other.
- During Superstorm Sandy, 125 MEL member towns suffered flood damage. The MEL established a Special Claims Committee that included a retired judge as the arbitrator. Every claim was resolved without litigation.

- After a devastating fire struck the Edison DPW garage and destroyed the township's fleet of heavy-duty trucks two days before a major snowstorm, adjusters for the Central Jersey JIF found a fleet of heavy trucks available for lease in another state. The replacement equipment arrived in Edison just hours before the storm.
- At the beginning of the COVID-19 pandemic, New Jersey municipalities experienced serious problems selling municipal bonds. The MEL established a Joint Cash Management and Investment (JCMI) pool to purchase debt securities issued by the MEL's members – a major factor in stabilizing the bond market for local governments across New Jersey. This effort was started and led by several commissioners, especially Jon Rheinhardt (Morris JIF) and Chuck Cuccia (South Bergen JIF).

Under state law, JIF Commissioners must be either local elected officials or employees of member local units. An Executive Committee and officers are elected at the reorganization meeting each January by the Commissioners. The Committee meets monthly to decide the Fund's business. These meetings are subject to all of the laws impacting local governments. Over 250 local officials participate each month in the governance of their local JIFs and, therefore, are continually exposed to the importance of safety and claims control.

JIFs are governmental entities, not insurance companies. They are closely regulated by the State and operate according to all of the rules for governmental entities.

JIF Commissioners should be familiar with:

- ***Title 40A:10-36:*** The enabling statute (See Resources Section), Title 40A, is the municipal code, not the insurance code. Legally, JIFs are not considered insurance companies, but rather an inter-local governmental entity responsible for the insurance program of its members. This statute even exempts JIFs from the insurance code. [243]
- ***NJAC 11: 15 – 2:*** The regulation controlling JIFs was adopted jointly by the New Jersey Department of Community Affairs and the New Jersey Department of Banking and Insurance. While there are JIFs in almost every state, New Jersey has the most comprehensive regulations.
- **The JIF Bylaws:** This document establishes the basic structure of a JIF. The bylaws must be ratified by the governing bodies of the member local units and are rarely amended.
- **The Plan of Risk Management:** This plan fleshes out the details and is adopted each year by the JIF's governing body.

Bylaws

This document includes all of the important provisions in the statute and regulations. Most JIFs in New Jersey have adopted the model bylaws developed in the late 1990s.

Article 1: Definitions

This section is mostly boilerplate, mirroring the State regulations. Several definitions are especially important:

- **Administrator and Servicing Organization:** Under the regulations, there are three ways to administer a JIF:
  - Hire employees to operate the Fund.

- Allow one member to provide the administration as "Lead Agency."
- Retain an outside administrative firm to act as Executive Director and hire other "Servicing Organizations" to perform those functions that are not assigned to the Executive Director.

Almost all municipal JIFs in New Jersey adopted the latter approach to avoid the personnel issues required when hiring employees.

- **Indemnity and Trust Agreement:** Under the law, each member must agree to be jointly and severally liable for JIF's obligations. As a result, it is almost impossible for a JIF to become bankrupt because it is backed by the full faith and credit of all its members. The model agreement approved by the New Jersey Department of Banking and Insurance is in the Resource Section.

This definition also limits the term of membership to a three-year maximum. While each JIF can establish its own minimum period of membership up to this maximum, most have elected three-year terms so that there is membership stability from year to year.

Article 2: Membership

A local unit must adopt a resolution that accepts the JIF's bylaws and authorizes the execution of the Indemnification and Trust Agreement. The application must be approved by either a majority vote of the Fund Commissioners or a two-thirds vote of the Executive Committee's full authorized membership.

The prospective member must also meet any territorial or similar limitations established in the bylaws. Many JIFs limit their membership to a specific territory such as a county, while others limit their membership to certain types of local units, such as housing authorities or utilities.

This section also discusses membership renewals. A member wishing to withdraw must give notice at least 90 days in advance of the end of its membership period, which corresponds to the beginning of the Fund's budget process. If a member fails to provide timely notice, its membership is automatically extended for a year in most JIFs. If the member wants to withdraw at the end of the extended period, it must still give notice 90 days in advance, or its membership is automatically extended again. In a few JIFs, the member must reapply for membership if it fails to renew before the 90-day deadline.

A renewal application is deemed approved unless rejected for cause by the Fund Commissioners 45 days prior to the end of the membership period. "Cause" is defined as failure to meet the Fund's risk management or underwriting standards or other reasons approved by the Commissioner of Banking and Insurance.

Article 3: Organization

Commissioners: A JIF is controlled by Fund Commissioners. One Commissioner, either an elected official or employee, is appointed by each member's governing body. Elected officials are appointed for two-year terms while employees must be reappointed each year. Members can also appoint an alternate.

A Special Commissioner is appointed as the tie-breaker whenever the number of members is even. The power to appoint the Special Commissioner is rotated alphabetically between the members.

Commissioner Responsibilities:

- Operate the Fund *"in the interests of the total membership."* A Commissioner must consider all members, not just the member the Commissioner represents.
- Establish the budget and coverage limits, purchase reinsurance and determine all other financial and operating policies of the Fund.
- Invest funds in accordance with the rules for the investment of public monies.
- Enter into contracts in accordance with the Public Contracts Law.
- Adopt the risk management plan.
- Join a Joint Insurance Fund. This provision permits the local JIFs to join the MEL and the Environmental JIF(E-JIF).

Each Commissioner has one vote. As a general principle, inter-local agencies in New Jersey, including JIFs, operate on the principle that each member has one vote, even though the members are of different sizes. One of the few exceptions is the E-JIF, where the statute specifically allows proportional voting. This provision only pertains to environmental JIFs.

Annual Reorganization Meeting: The Commissioners have a reorganization meeting at the beginning of each year, where they elect a Chairperson and a Secretary, who is really the Vice Chairperson. A few JIFs have three officers: Chairperson, Vice Chairperson and Secretary.

If the membership exceeds seven, the Commissioners must also elect an Executive Committee of seven members, including the officers and a maximum of seven alternates. Some JIFs with more than seven members continue to meet monthly as a full Board of Fund Commissioners so that every member has a vote. However, they are still required to elect an Executive Committee so that the JIF can conduct its regular business even if the full Board of Commissioners lacks a quorum.

Appointments: A JIF can delegate all professional functions except the Independent Auditor to a single outside firm or a number of firms. The structure for the JIF is defined in the bylaws:

- **Executive Director:** Responsible for the overall operation of the Fund.
- **Fund Attorney:** Advises the Commissioners on legal matters and oversees the attorneys assigned to defend claims. Most JIFs also permit the Fund Attorney to defend some claims.
- **Actuary:** Certifies the budget and financial reports for soundness.
- **Treasurer:** Acts as the Custodian of the Fund's assets. Note that while the Treasurer is responsible for the bank accounts, the Treasurer does not maintain the general ledger in many JIFs as a basic check and balance. [244]
- **Auditor:** Has the same function for the JIF as with any other local governmental entity. The annual audit report must be accepted by the Commissioners, who must also certify that they have read the comments section at the end of the report.

Major Service Contracts:

- **Claims Administer:** Adjusts the claims for the JIF.
- **Managed Care Organization:** Contracts with doctors and medical facilities to treat employee injuries.
- **Safety Service:** Provides risk control services for JIF members.
- **Underwriting Manager:** Places the JIF's Excess Insurance and answers coverage questions.

Selection of Service Providers and Other Professionals: The JIF Commissioners follow the procedures established by the Public Contracts Law and the best practices recommended by the New Jersey Controller. The MEL also retains a Qualified Purchasing Agent (QPA) who oversees the process. At the intervals established by law, the JIFs advertise Request for Qualifications (RFQs) for all functions using a format adapted from the standard used by the New Jersey Department of Purchasing.

An evaluation form is adopted before responses are received. The responses are initially reviewed by the standing committee responsible for that particular function. Depending on the circumstances, the Commissioners may retain an independent consultant to help evaluate the responses. During the process, the Commissioners rate each proposal using the evaluation form. The recommendation then goes to the full Board of Commissioners for final ratification. All contracts, including those for the positions of Executive Director and Fund Attorney, are subject to the RFQ process.

Selection of Defense Attorneys: The process begins with a periodic RFQ released by each Fund Attorney to give potential candidates and opportunity to make application to participate in the Fund's legal panel. After reviewing the applications, the Fund Attorney recommends a panel that is appointed each year by resolution of the Commissioners at their January reorganization meeting. For Public Officials and Employment Practices, the panel is created by the insurer after receiving advice from the local JIF Fund Attorneys. After the panel is selected, individual cases are assigned to defense attorneys by the Fund Attorney, or by the insurer in the case of Public Officials and Employment Practices Liability.

JIF defense panels include almost all law firms in the state that have successful defense experience in areas of the law pertaining to *Title 40* (the municipal code), *Title 59* (Tort Claims Act), Workers' Compensation, Law Against Discrimination (LAD) and Conscientious Employee Protection Act (CEPA). Many of the firms that are not on the list regularly represent plaintiffs in lawsuits against member local governments and, therefore, are conflicted from serving on the defense panels.

Under New Jersey law, local units are permitted to adopt an Indemnification Ordinance to protect officials and employees under most circumstances. Because a JIF is a local unit, it is also authorized to enact an Indemnification in its bylaws.

Committees: The bylaws also give the Chairperson the power to establish and appoint advisory committees. The number of committees a JIF has depends on its size, but each must have a Safety Committee. The committees usually meet in advance of the main monthly meeting to explore issues in preparation for consideration by the full Board. Committee structure varies, but JIFs generally include:

- **Management Committee:** Responsible for long-range planning, budgets, requests for proposals, contracts, finances, audits and regulatory compliance.
- **Coverage Committee:** Responsible for insurance-related issues, coverage determinations and membership applications.
- **Safety Committee:** Responsible for the risk control program.
- **Claims Committee:** Responsible for approval of claims presented by the claims adjusters for settlement.

Risk Managers: With rare exceptions, towns in New Jersey do not have in-house risk management expertise and need professional assistance for this function. Most JIFs require that their members retain a licensed insurance advisor to act as Risk Manager. This insurance advisor must be appointed pursuant to the Public Contracts Law and is subject to the same "pay-to-play" regulations applicable to the local unit's other professional appointees. There is a considerable difference between the various JIFs on how Risk Managers are compensated. Refer to your JIFs bylaws on this issue.

Article 4: Operation of the Fund

This article begins with a series of provisions that clearly establish that a JIF must operate to the standards of a New Jersey public entity, including the Local Fiscal Affairs Law, Local Public Contracts Law and the various statutes authorizing the investment of public funds. New Jersey has a reputation for implementing the country's most robust regulation system of JIFs. At least five State agencies regulate JIFs:

- **Department of Banking and Insurance (DOBI):** DOBI is responsible for technical insurance-related regulation. It requires extensive annual filings, including budgets, audit statements, contracts and insurance and excess policies. Every five years, DOBI assigns a team of examiners to the JIF's office (for four or five months) to review the financial records, meeting minutes, contracts, excess and reinsurance agreements and other critical documents. DOBI also audits a sample of claims and engages their Actuary to render an independent opinion on the JIF's reserves.
- **Department of Community Affairs (DCA):** DCA focuses on JIF compliance with laws and regulations concerning governmental operations, including the Fiscal Affairs Act, Public Contracts Law, Local Government Officials Ethics Act, Open Public Meetings Act and the Open Public Records Act. DCA also receives copies of all filings made to DOBI and has joint authority concerning the approval of JIF Bylaws and Plans of Risk Management.
- **New Jersey State Controller:** JIFs are required to file any contract that exceeds $2 million with the Controller, and must seek prior approval for any contract that exceeds $10 million. JIFs are also required to file all financial audit reports with the Controller's office.
- **New Jersey Department of Labor and Work Force Development (DOL) and the New Jersey Department of Health (DOH):** The JIF works closely with members to assist in their compliance with the regulations promulgated by DOL and DOH concerning employee safety. The JIFs also assist members in complying with various laws concerning employment practices. The MEL developed and updates a comprehensive employment practices Risk Control Program that has been adopted by over half of New Jersey's local units.

- **New Jersey Department of Environmental Protection (DEP):** The E-JIF provides the technical engineering assistance and training that assists members in complying with DEP regulations.

Plan of Risk Management: The Commissioners are also required to adopt a Risk Management Plan and file it with the State for approval. The plan is prepared by the JIF's Underwriting Manager and adopted at the January reorganization meeting. It must detail:

- Lines of coverage, limits and amount of risk retained by the JIF.
- Reinsurance and Excess Insurance.
- Methods to calculate member assessments.
- Loss adjustment procedures.
- Actuarial methodology.

The regulations also require JIFs to file a financial report with the State twice a year. The year-end report is supplemented with the Auditor's report and a statement from the Actuary. The regulations also require reports to the membership at least quarterly. Most Funds accomplish this with a series of reports, known as "Fast Tracks," that monitor the Fund's performance.

The last section of Article 4 expands the Fund's authority beyond merely providing insurance and permit JIFs to provide safety and loss control services, training, equipment and apparatus.

Article 5: Rules of Order

Meetings: The quorum for a Fund Commissioner's meeting is a majority unless the number of members exceeds 25, in which case the quorum is 13 plus 20% of the number of members in excess of 25. The reason for this is that larger Funds sometimes experience problems getting enough members to attend the January reorganization meeting. Another provision permits a paper ballot if a quorum is not reached.

All meetings of the Fund are subject to the Open Public Meetings Act (OPRA). Unless otherwise provided, "Robert's Rules of Order" govern the conduct of all meetings.

Transparency: The MEL and the JIFs substantially exceed the requirements for transparency.

- **Public Meeting Notices:** JIF public meeting notices are posted on the bulletin boards of all member municipalities and authorities.
- **Newspapers:** All MEL public meeting notices, requests for competitive proposals, contract awards and budgets are published in papers throughout the state.
- **OPRA Requests:** The MEL and the JIFs respond to an average of 85 OPRA requests each year.
- **Annual Report:** The MEL distributes 5,000 copies of its annual report each year.
- **Website:** All notices are posted at NJMEL.org. The website is also a comprehensive resource that averages 9,000 - 15,000 visits per month from users both inside and outside New Jersey.

Bylaw Amendments: The Fund must hold a hearing within 45 days of a proposed amendment. The amendment must then be approved by at least 75% of the members within six months of the hearing. If the amendment passes that requirement, it must also be approved by the State.

Article 6: Budgets

The budget is usually introduced in October and adopted in November after a public hearing. A few JIFs introduce and adopt their budgets one month later. The budget is then filed with DOBI and DCA. This timing allows members to know their insurance assessments in time for their temporary budgets, adopted in January.

Major Budget Appropriations:

- **Claims:** computed by the Actuary.
- **Excess Insurance and Reinsurance:** computed by the Underwriting Manager.
- **Expenses:** almost entirely professional services.

Article 7: Assessments

- **Manual Premium:** There are manual rates for each line of coverage. The first step is to compute each member's manual premium by multiplying each member's exposure data, including payroll, the number of employees, vehicle count and values, by the manual rate. The exposure data is updated each year.
- **Experience Modification Factor:** Next, the JIF computes an experience modification factor for workers' compensation, auto liability and general liability based on each member's claims experience. A factor of 1.0 means the member's experience is average, more than 1.0 means higher than normal experience and less than 1.0 means the member has better than expected experience.
- **Member Assessment:** Each member's assessment is computed by multiplying its manual premium by its experience modification factor.
- **Capping:** Most JIFs also have a provision that caps the maximum amount a member's assessment can change in any given year. Talk with your JIF's Executive Director about the formula used by your particular JIF.

Article 7: Supplemental assessments

The JIF can adopt a supplemental assessment to cover the deficit if a Fund year is in an overall negative position. Supplemental assessments are chargeable to all members who participated in the JIF during the deficit year. Supplemental assessments are usually netted against surplus from other Fund years. Otherwise, supplemental assessments are spread over a number of years, starting in a subsequent year.

Article 8: Return of Surplus

The JIF must file an application for DOBI's approval before a dividend can be paid. The State has adopted a dividend formula that caps dividends based on the amount of unpaid claims. Dividends are payable to all members who participated in the JIF during the year that generated the surplus. In most JIFs, members who leave the Fund do not receive dividends until the statute of limitations has run on all exposures during the period of membership. Effectively, this means the dividends are held in escrow for over 50 years.

Article 9: Excess and Reinsurance

All JIFs are required to secure Excess or Reinsurance to cap claim liabilities. The majority of JIFs providing insurance to municipalities and authorities in New Jersey meet these requirements by belonging to the Municipal Excess Liability Joint Insurance Fund (MEL). The advantage of this approach is that, because of its size, the MEL can purchase Excess and Reinsurance at a lower rate and self-insure more of this risk itself.

Article 10: Trust Fund Accounts, Investment and Disbursements

Under this section, a JIF must follow all of the financial rules applicable to local units of government. The Treasurer presents a bills list for adoption during the meetings.

Article 11: Conflicts of Interest

One of the reasons JIFs are distinctly different from insurance companies is that everyone connected to a JIF is subject to the Local Official's Ethics Act. For example, all officers of the Fund's Administrator and many other fund professionals complete the annual filings required by any other local official.

Article 12: Voluntary Dissolution of the Fund

Arrangements must be made to pay all open claims before a JIF can be dissolved. In some cases, claims remain open for decades. Under the regulations, a dissolution plan must be voted on by the membership after a hearing. Then, the application must be filed for approval by DOBI.

Article 13: Claims Handling Procedure

This Article provides that the Commissioners must approve any claims settlements that exceed the authority they grant to the claims adjusters in the Risk Management Plan. In some JIFs, all of the Commissioners review claims at the monthly meetings, while other JIFs establish a claims sub-committee to approve the PAR's (Payment Authority Requests).

The MEL has established a multi-tiered approach to claims administration:

- Each local JIF contracts with a claims service provider to administer claims within its retention.
- The MEL contracts with a separate claims adjuster to administer claims that potentially exceed the local JIF's retention.
- The Executive Director employs a claims examiner to oversee the local JIF and MEL adjusters.
- The Excess and Reinsurers employ senior adjusters that monitor claims that potentially exceed the MEL's retention.
- The MEL Auditor reviews claims as a part of its annual report and the MEL Audit Committee periodically retains a consultant to also review the adjusters and examiners.
- The Department of Insurance audits the claims adjusters as a part of the State's periodic examination of the JIFs and the MEL.

Article 14: Complain Handling Procedure

Whenever a complaint is received in writing, the Executive Director must send a copy to the Commissioners and place it on the next meeting's agenda. The Commissioners are then required to consider the complaint and render a decision. The findings must be communicated in writing to the complaining party and the Commissioner from the member affected by the complaint. The written notice may include an opportunity for a hearing before the Commissioners.

Parties dissatisfied with the decision may appeal to the independent appeal organization or arbitrator designated by the Fund annually. Any party that is still dissatisfied may exercise any other remedies provided by law.

Article 15: Other Conditions

- The Fund has the right to inspect each member's facilities and records.
- Members are required to report any injury or other claim to the JIF as soon as practical. Failure to comply with this provision could nullify coverage under some circumstances.
- Each member must fully cooperate with the JIF in adjusting and defending claims.
- A member may sue the Fund until complying with all provisions of the bylaws.
- If the JIF makes a claim payment, it is subrogated to all of the member's rights of recovery from other sources.

This is not as complicated as it appears and really involves sound governmental process. A Commissioner's responsibilities are similar to those as an elected official or local governmental employee. Even the technical insurance aspects are not difficult with a little experience.

Selected Case Law:

State v. Brett Gookins (1994) [245]

Facts: In 1989 and 1990, an officer made 84 drunk-driving arrests after falsifying breathalyzer tests. The officer was caught in a sting operation, and the New Jersey Supreme Court overturned the convictions. When the motorists also sued for damages, the question arose whether this was a single occurrence or multiple occurrences. At that time, the local JIF retained the first $100,000 of the risk; the MEL retained $900,000 excess of the JIF's $100,000, and American Re reinsured the risk excess of the MEL's $900,000. If this was one occurrence, the JIF's exposure was limited to $100,000 in total, but if this were multiple occurrences, the JIF's potential exposure was $8.4 million (84 cases times $100,000 per case).

Decision: American Re agreed that since the MEL took the position that this was all one occurrence, American Re would accept the MEL's position as well. From the beginning, the Reinsurer stood behind the JIF and the MEL.

Comment: In a traditional reinsurance relationship, the Reinsurer "follows the fortune" of the reinsured. A good Reinsurer, such as American Re, now Munich Re America of Princeton, backs-up its long-term clients. It is important to investigate the reputation of a Reinsurer, as some Excess Insurers and Reinsurers shave prices, but are quick to go to court to contest coverage.

Shapiro v. Middlesex JIF (1998) [246]

Facts: A chiropractic group sued a JIF contending that it failed to refer cases to the group. The group contended that this constituted tortious interference with business relations and was a violation of the New Jersey Anti-Trust Act.

Decision: The Court ruled that a JIF was a local governmental entity and was not subject to anti-trust laws. Further, a JIF is entitled to all of the immunities and protections in *Title 59* (see Chapter 3).

The court wrote:

> "By reason of the role that JIF plays on behalf of its constituent municipalities, and the fact it must conform to the rules and regulations applicable to other local units, we deem JIF to be a "special function governmental unit" for purposes of immunity."

Comment: This case affirms that a JIF is a governmental entity. N.J.S.A 40A:10-48 specifically provides:

> "A joint insurance fund established pursuant to the provisions of this act is not an insurance company or an insurer under the laws of this State, and the authorized activities of the fund do not constitute the transaction of insurance nor doing an insurance business. A fund established pursuant to this act shall not be subject to the provisions of Subtitle 3 of *Title 17* of the Revised Statutes," the laws that regulate insurance companies.

[243] Shapiro v. Middlesex JIF, 930 F. Supp. 1028 (D.NJ.1996)
[244] The Treasurers of the various JIFs in the MEL also serve on the Investment Committee that releases a joint RFQ for banking and investment services every three years.
[245] A-36-93 (1994)
[246] 930 F. Supp. 1028 (D.NJ.1996)

CHAPTER 10

ENVIRONMENTAL RISK MANAGEMENT

Environmental liability [247] was not a significant concern until 1983 when the New Jersey Courts awarded almost $16 million damages in Ayers v. Jackson Township. [248] While the New Jersey Supreme Court did not affirm this decision for another four years, the impact to the insurance market was immediate. This case was a significant factor in the insurance industry's decision to cancelling public entities in 1985, which led to the development of JIFs to fill the void.

The Ayers case involved claims from residents contending that their well-water was contaminated by toxic pollutants leaching into the Cohansey Aquifer from the Jackson Township landfill. After an extensive trial, the jury found that the township had created a "nuisance" and a "dangerous condition" by virtue of its operation of the landfill. The jury also determined that the township's conduct was "palpably unreasonable" and was the proximate cause of the contamination of plaintiffs' water supply.

The jury awarded $2 million for emotional distress and $5.4 million for deterioration of their quality-of-life during the 20 months when residents were deprived of running water. $8.2 million was placed in a fund to cover the future cost of annual medical monitoring. This case also established the principle that the cost of pollution claims must be shared by all of General Liability insurers that covered Jackson Township during the many years that toxic waste was placed in the landfill. As a result, insurers rushed to exclude pollution claims in all policies going forward. [249] Public entities were now on their own for any new pollution.

Environmental Emergency Information

STEP ONE

LOCAL HAZMAT RESPONDERS

Telephone: _____

Contact: _____

Address: _____

STEP TWO

EJIF ENVIRONMENTAL HOTLINE

1-800-289-6681

NOTE: 24 hours/7day per week, leave message and call will be returned shortly.

NJDEP 24 HOUR TOLL - FREE HOTLINE FOR ENVIRONMENTAL INCIDENTS

1-877-WARNDEP

(1-877-927-6337)

The State responded to this crisis in 1987 by establishing the N.J. Spill Compensation Claims Program (Spill Fund) [250] to pay claims primarily related to potable water contamination. This program is funded by a tax on the petroleum and chemical industries. Before the Spill Fund pays a claim, it requires claimants to sue the responsible parties that caused the pollution. Therefore, the Spill Fund is a double-edged sword for local government. Under some circumstance the local government can apply to the Spill Fund to cover remediation costs. However, in most circumstances, the local government is the defendant in lawsuits by parties as a condition of their making a claim to the Spill Fund.

The MEL was not large enough to insure environmental risk until 1991 when it had grown to over 200 local governments. The Commissioners decided to create a specialized pool to provide environmental coverage. The New Jersey Municipal Environmental Risk Management Fund (E-JIF) was finally established after the enabling law was signed in October 1993.

E-JIF Structure

The E-JIF has a different structure than other JIFs. Under the enabling statute, the E-JIF is authorized to bond especially large claims. No other JIF is legally permitted to bond. Fortunately, bonds have not been necessary, and the E-JIF has built a large surplus over the years.

Current E-JIF membership includes 13 JIFs with a collective membership of 313 municipalities, 72 authorities and seven other entities. [251] Membership is limited to JIFs as opposed to individual governmental entities. This prevents adverse selection where the only municipalities and authorities that apply for membership are those that already have a problem. While in most inter-local agencies, including JIFs, each member receives an equal vote, the E-JIF is one of the few entities permitted to adopt proportional representation.

Coverage

No other state has been able to match the success of New Jersey's E-JIF. The program provides the most extensive coverage available to local government anywhere in the country and includes five coverage areas:

1. Third-Party Liability
2. On-Site Clean-Up Costs
3. Public Officials Pollution Liability (POL)
4. De Minimus Abandoned Waste Sites
5. Storage Tank Systems

1. Third-Party Liability

This part of the policy covers the activities of public entities that may result in an actual or alleged pollution conditions [252] that cause bodily injury or damage to property of others. The E-JIF pays losses due to liability for bodily injury and/or property damage caused by pollution conditions emanating from a covered location or arising from covered operations on behalf of the member local governments. This coverage is subject to exclusions [253] and legal defense is included subject to the aggregate defense costs limit.

Third-Party Liability Limits:

- $1,000,000 per claim
- $1,000,000 annual aggregate
- $250,000 sub-limit Transportation coverage
- $250,000 sub-limit Cyber coverage

2. On-Site Clean-Up Costs

Third-parties often pollute public property by, for example, dumping toxic material in a public park late at night. This coverage section pays remediation costs triggered by pollution conditions caused by an unrelated third-party on member local government public lands.

On-Site Clean-up Limits:

- $ 50,000 per claim
- $ 100,000 annual aggregate

Note: The member is required to make application to the Spill Fund or other available funding sources for reimbursement. The E-JIF coverage is net of this reimbursement.

3. Public Officials Pollution Liability

All Public Officials' Liability (POL) policies have an absolute pollution exclusion. This coverage section covers claims that would have otherwise been covered by POL policies, had they not included the pollution exclusion. Legal defense costs are included, subject to aggregate defense costs limits.

Public Officials Pollution Liability Limits:

- $1,000,000 per claim
- $1,000,000 annual aggregate

4. De Minimus Abandoned Waste Sites

Through various departments and refuse collection, local governments have contributed substantial amounts of waste to hazardous waste landfills. Municipalities that hired an independent waste hauler are still responsible for this waste. Even if a municipality had no knowledge of where its waste was being taken, it can be held liable under the concept of strict liability for pollution. When the Federal EPA or New Jersey DEP remediates a waste site, it assigns the costs to all Potentially Responsible Parties (PRPs). This is complicated by the fact that it is often unclear who was truly responsible for the hazardous waste.

Because the E-JIF often insures many local governments in the region served by a landfill, it is able to negotiate a reasonable settlement on behalf of a large block of towns. The E-JIF has also saved millions in defense costs by assigning a single attorney to defend all of its members who are parties to the action. Most of the costs are then charged back to the insurers that covered the members before the E-JIF was created. The E-JIF has established a comprehensive database of these prior insurers. [254]

De Minimus Abandoned Waste Sites Limits:

- $50,000 per local government

5. Storage Tank Systems Coverage

Both the Federal EPA and the New Jersey DEP require tank owners to insure underground storage tanks to prove that the costs will be paid in the event of a leak. E-JIF's storage tank systems coverage meets these requirements. The policy covers bodily injury or property damage liabilities in addition to the clean-up caused by a release from a storage tank at any scheduled site.

The claim must be first made against the member local government during the policy period, and then must also be reported to the E-JIF during the policy period to be considered for coverage. There is no coverage for underground storage tanks that have been rejected or are unknown and/or unscheduled. Unregulated underground storage tanks may also be covered, subject to E-JIF underwriting rules. Above-ground storage tanks must comply with all underwriting requirements established by the E-JIF, including compliance testing. [255]

Storage Tank Systems Coverage Limits:

- $1,000,000 each incident –Third-Party
- $1,000,000 each corrective action – On-Site Clean-Up Cost
- $1,000,000 aggregate limit
- $100,000 aggregate defense limit

Underground Storage Tank Remediation Grant Program

The E-JIF may make a grant for up to a maximum of $10,000 per impaired location for unknown/undisclosed underground storage tanks to reimburse members for remediation costs. The member must not have had prior knowledge of the tank. The grant request must also demonstrate proper due-diligence if the tank was found on a newly acquired property. Each member local government is subject to a lifetime maximum of grant applications.

Risk Control

One of the E-JIF's primary objectives is to contain costs through sound environmental control practice. The E-JIF has engaged environmental engineering companies, an experienced claims-servicing company and a panel of environmental defense attorneys to provide adjustment services. Members are provided with continuing education, environmental alerts, a website containing additional resources, and access to a professional Environmental Engineering Consultant to answer questions at no cost.

Environmental Audit Services

An E-JIF environmental professional conducts a periodic audit at each facility. Unlike the New Jersey DEP, the E-JIF does not issue violations or penalties and helps members resolve issues before a regulator conducts a compliance inspection. The audit involves a review of programs and record keeping. The environmental professional also inspects facilities and grades the operation on a scale of 1 to 100 based on the risks and severity of the deficiencies found.

Petroleum Storage Tanks

Local governments commonly have large fuel tanks for fleet operations, including DPWs and Utilities, and smaller tanks for emergency generators and heating fuel. Leaky tanks can result in expensive remediation.

- **Underground Storage Tanks (USTs):** There is a high risk that steel USTs will rust and develop leaks over time. Being underground, these conditions may go unnoticed for years. To reduce the risk, the EPA and New Jersey DEP mandate double-walled tanks, equipment to detect leaks, regular inspections and, most recently, a license requirement for the individual responsible for managing the tanks. The E-JIF provides annual inspections for USTs. Unlike the EPA and New Jersey DEP, the E-JIF also monitors unregulated USTs of less than 2,000 gallons used for heating oil. The E-JIF established a policy to limit the useful life expectancy of a regulated UST to 20 years. It is far less expensive to replace a tank before it leaks. The E-JIF keeps a full database of all regulated and unregulated USTs for its members.
- **Above-Ground Storage Tanks (ASTs):** ASTs have the advantage that any leaks are more easily seen. The E-JIF requires AST owners to physically protect them from vehicle collisions and other possible accidents. The E-JIF assists members comply with the EPA's Spill Prevention, Control and Countermeasure [256] requirements with sample SPCC plan templates and free training. Another E-JIF program monitors underground piping associated with ASTs. Members are encouraged to re-engineer the piping system to an above-ground location, add a leak monitoring system on the piping or conduct biennial tightness testing. The E-JIF also keeps a full database of all ASTs, including details about tank construction.

Continuing Education

- The E-JIF offers a series of training classes around the state, including Spill Prevention Control and Countermeasures (SPCC), stormwater management, air permitting, pollution prevention planning, resiliency and many others each year. These training presentations are available at NJEJIF.org.
- One of the most popular presentations concerns the Municipal Stormwater Regulations published by New Jersey DEP in 2004. When the New Jersey DEP lacked funds to develop a training, the E-JIF fulfilled the requirement with a series of online videos. The New Jersey DEP's website links to NJEJIF.org.
- The E-JIF publishes technical bulletins to keep members up to date, available at NJEJIF.org.

24-Hour Emergency Response Consulting

The E-JIF provides a 24/7 hotline, 1 (800) 289-6681, for members to call during emergencies. In the event of a spill or other environmental incident, the E-JIF will immediately dispatch an environmental professional to assist the local incident commander. The E-JIF has an on-call emergency response crew for larger incidents. The E-JIF distributes emergency response posters with phone numbers that should be posted in DPW, Utility, Fire Departments and other appropriate locations. The NJ DEP also has a 24-hour hotline for environmental incidents, 1 (877) WARNDEP or 1 (877) 927-6337.

Foreclosed Properties

The E-JIF offers a free environmental screening service before a member acquires a property. An environmental professional will conduct a walk-through of the property and search various databases for outstanding environmental problems. Although it is not intended as a substitute for more extensive due diligence, such as a Phase 1 or New Jersey DEP Environmental Site Assessment, it can give a member a quick heads-up regarding environmental problems with the site. When concerns are uncovered, the member will often choose not to acquire a property or use the information in negotiating the sales price. In more extreme cases, members have allowed the site to be taken over by the EPA or New Jersey DEP to spare local taxpayers the burden of the remediation.

Emerging Issues

The E-JIF is also looking ahead at challenges that are just now becoming apparent, including:

- **Green Infrastructure:** New Jersey is planning stronger environmental design and construction standards, including green infrastructure. The concept is to design "green" spaces, such as pervious pavement, rain gardens, vegetative swales, cisterns and green roofs into commercial areas while reducing the use of impervious surfaces, such as concrete and asphalt. This increases the infiltration of water into the soil, improving water quality as water recharges the local aquifer. It also reduces the risk of flooding in nearby low-lying areas. Adding green infrastructure can also reduce what is known as the "heat island" effect, where less sunlight is converted to heat as green plants and other open spaces replace areas of black surfaces.
- **Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS):** PFAS are a large group of chemicals that were produced to create new substances, such as non-stick cooking surfaces like Teflon, materials to make carpets and furniture more stain-resistant and firefighting and fire suppression foams. They persist in the environment for a long time and show up in water supply systems. The New Jersey DEP is implementing new standards for the levels of these chemicals allowed in drinking water. The numbers used are very low, in the parts per trillion (PPT) range, and water supply systems may find they need expensive new water treatment equipment.
- **Resiliency:** Perhaps no emerging environmental concern has more potential impact than building resiliency into our communities during a period of climate change. Rising sea levels impact coastal communities, severe storms impact infrastructure, and climate change impacts the energy grid throughout the State. The E-JIF collaborates with members to meet the regulatory concerns promulgated by Federal and State agencies to address these issues.

Selected Case Law:

Re: Combe Landfill South (1998)

Facts: The Combe Landfill South, located on a 115-acre parcel, was in operation from the 1940s until it was ordered closed by the EPA in 1981. In addition to municipal garbage, the facility was licensed to accept non-hazardous industrial wastes, sewage sludge, septic tank waste, chemicals and waste oils. The EPA sued approximately 250 parties to recover clean-up costs estimated in excess of $150 million in 1998. Among the defendants were 21 towns insured by the E-JIF.

Decision: The E-JIF settled the lawsuit against its 21 members for $3.8 million. The E-JIF hired one law firm to defend all of its members to save costs and was able to fund the entire settlement without any contribution from the towns. Much of the money came from prior insurers.

Comment: The E-JIF used a process known as "archiving" to document the insurers that previously insured its members. In cases such as the Combe Landfill lawsuit, all of the contamination occurred before the towns became members of the E-JIF. By coordinating the claims against these prior insurers, the E-JIF resolved this very complex litigation on behalf of all 21 members. This strategy has been successfully utilized in a number of similar cases.

Re: Toms River Lagoon Drive (2003)

Facts: A DPW crew ruptured a heating oil line while installing a stormwater pipe in an easement between two homes, extensively contaminating one of the houses. The clean-up was complicated by the fact that the property backed up to a waterway, and the line ran under the slab foundation of the house.

Decision: The E-JIF decided that the best way to resolve the case was to purchase the property from the elderly homeowner and demolish the structure. The E-JIF sold the property after the clean-up and recovered over $300K of the 800K cost.

Comment: This case demonstrates how the E-JIF creatively resolves otherwise politically sensitive issues.

NJDEP v. Occidental Chemical et al (2005)

Facts: Over the years, chemical plants along the Passaic River discharged toxic materials that poisoned the six-mile stretch in Newark, Harrison, East Newark and Kearny. Of special concern was dioxin, used to manufacture Agent Orange during the Vietnam War. Because of tidal movement, the high concentrations of dioxin also contaminated other areas of the river and the NJ/NY Harbor. The direct defendants counter-sued numerous municipalities, 32 of which were members of the E-JIF, alleging that municipal stormwater and discharge from sanitary processing plants contributed to the contamination.

Decision: The E-JIF settled the case on behalf of its 32 members for just over $2 million. Under the settlement, the E-JIF paid the $50,000 policy limit for each of the members and the defense costs. Each town was responsible for the remaining $45,000. Individual JIFs picked up that expense so that there was no net cost to their members in some cases.

Comment: The E-JIF retained three attorneys, who each represented ten or eleven towns. This strategy saved at least $5 million in legal bills.

Mignano v. Sullivan (2006) [257]

Facts: A light industrial building was used to manufacture mercury thermometers until the company ceased operations and filed for bankruptcy in 1994. The DEP issued a spill compensation and control directive requiring the clean-up of the site, but neither the company's former owner nor the DEP ever followed up on the agreement. In 2001, a new owner acquired the property in a tax sale/foreclosure procedure and then flipped the property to another owner. This new owner then leased the property to a daycare center known as Kiddie Kollege. In 2006 the DEP determined the site had been converted to the new use without having been remediated. Test results in 2006 revealed the presence of mercury vapors in the building. Testing of the children also revealed that some had elevated mercury levels. The parents sued the current and prior owners along with the town.

Decision: In a decision that was subsequently overturned on appeal, the trial judge ruled that the town had a duty to confirm that the remediation was complete before issuing building permits. The judge ordered the town to pay for medical monitoring and awarded several million in legal fees to the plaintiff's attorneys. The appellate court overturned this verdict and ruled that under the Tort Claims Act (See Chapter 3), the town cannot be held liable for negligence in issuing a permit. The plaintiffs then appealed to the New Jersey Supreme Court, who refused to hear the case.

Comment: The E-JIF fought this expensive legal battle to protect both the individual town and all communities from what could have been a very bad precedent.

Re: Haddonfield (2010)

Facts: The Haddonfield DPW Superintendent called the E-JIF's environmental engineers concerning a suspected leak in the underground pipe from their above-ground tank. The E-JIF's engineer determined that the lines did not hold pressure and that petroleum odors were detected downstream. The town then contacted Hazmat and the New Jersey DEP.

Decision: The E-JIF paid $600,000 to remediate the spill.

Comment: The E-JIF also contracted with its Environmental Engineering vendor to test the integrity of all similar systems owned by members throughout the state. This is another example of the E-JIF going considerably beyond any insurance company to prevent losses and protect the environment.

[247] Much of the material for this chapter was provided by Peter King Esq, a member of the E-JIF legal panel, and Richard Erickson, the E-JIF Engineering Director.
[248] 106 N.J. 557 (1987)
[249] In Nunn v. Franklin Mutual Insurance Company (644 A.2d 1111 1994), the courts ruled that the absolute pollution exclusion is enforceable in a commercial policy because commercial policyholders are able to understand policy language.
[250] *N.J.S.A. 58:10-23.11 et seq.* effective April 1, 1987
[251] As of January 1, 2019.

[252] Pollution conditions mean the discharge, dispersal, release, escape, migration or seepage of any solid, liquid, gaseous or thermal irritant, contaminant or pollutant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, materials or waste materials, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater. Waste materials include materials to be recycled, reconditioned or reclaimed.

[253] Exclusions: (Partial Listing – Refer to policy for a complete list of exclusions).

The E-JIF will not pay or defend under the third-party liability coverage part:

a) Pollution conditions that existed prior to the inception date of this policy
b) Injunctive or non-monetary relief
c) Lead
d) Asbestos
e) Workers Compensation, unemployment compensation or disability benefits
f) Employment Practices Liability
g) Mold or fungi
h) Contractual Liability, except where coverage would apply in absence of contract
i) Acid rain
j) Automobile (except transit sublimit), aircraft, watercraft
k) Pollution conditions after location has been sold, leased, or abandoned
l) Chlorine based products
m) Airports (unless endorsed)
n) Willful, deliberate non-compliance with regulation, statute, or other law

[254] De minimus abandoned waste site coverage is subject to exclusions and conditions including but not limited to:

- Legal services will be provided solely by the approved E-JIF attorney.
- The covered local government must agree to participate in any group settlement proceedings deemed appropriate by the E-JIF attorney.
- The E-JIF must agree to the negotiated settlement.
- The member local government and the E-JIF must be indemnified from further liability at site as a result of payment.

[255] Storage tank coverage exclusions: (Partial Listing - Refer to Policy for all Exclusions)

The E-JIF only covers those events emanating from any sudden or non-sudden release of petroleum arising from the operation of a storage tank at any scheduled site that results in a need for clean-up and/or compensation for bodily injury or property damage neither expected nor intended by the insured. The coverage does not apply to:

a) Any claim arising from any knowingly unlawful, dishonest, fraudulent, criminal, malicious or wrongful act or omission committed by or at the direction of any supervisor, department head, elected or appointed official of the local unit.

b) Any claim with respect to which the local unit was aware of non-compliance with any applicable statute, regulation, instruction or court order relating to the petroleum tanks.

c) Any claim arising from any accidental release at any place other than scheduled sites.

d) The cost of installation, replacement or repair of any storage tank or any other receptacle including the cost of excavation or backfilling, piping and valves, all leak detection systems and all containment systems and all monitoring systems.

e) Any routine maintenance, measurement or testing expense which is not occasioned by a pollution event.

f) Any fines, exemplary or punitive damages, statutory or other penalties, trebled or other multiple damages.

g) Any unregulated tanks that exceed the 20-year age limit as of January 1, 2014.

[256] SPCC – 40 CFR Part 112

[257] 151 A.3d 85 (2016)

CHAPTER 11

TECHNOLOGY RISK MANAGEMENT

Imagine you are a local government official in a community of 10,000 walking into your office in town hall. You start your computer and see a warning that your computer files have been hacked. The screen also tells you to pay a ransom of several hundred thousand dollars in bitcoins to restore your computer. Then, you find out that the virus has infected every computer in the municipal network.

You immediately reach out to the Network Manager, who discovers that since the back-ups were on the same network, they are also encrypted. You just learned the hard way that back-ups must be independent of the network. As tension builds, you call law enforcement who tells you they can't do anything because there is no way to identify the attacker or their location.

Then, you remember you have cyber insurance. You call the Risk Manager who is an important part of your Cyber Risk Management Program [258]. The Risk Manager calls the insurer, who quickly arranges for a Breach Coach to talk to your Network Manager. That begins a chain of events that results in a national Cyber Security firm working with you to solve the problem and restore normalcy.

Unfortunately, because the back-ups were compromised, you will have to pay the ransom to recover your data. You may also learn that despite paying the ransom, the criminals left other forms of malware on your system that could allow them to return later. After several days of downtime, lost productivity and sleepless nights, your network is cleaned of the infection and data restored.

This story has become all too common because criminals have found that attacking local government computer systems is a lucrative and low-risk activity. Cyber-attacks against public entities were rare as recently as 2016, but by 2019 there were 23,399 incidents reported. These statistics are heavily driven by malware-loaded phishing attempts, which reached a rate of 1 per every 302 e-mails received by the public sector. [259]

Ransomware is the most common type of cyber-attack. It encrypts individual computers and networks and requires payment, that typically costs several hundred thousand dollars, to get the decryption key. Another attack that often goes undetected involves infecting systems to find Personally Identifiable Information (PII) to sell on the dark web. A third scam involves sending convincing, but fraudulent, e-mails attempting to compromise financial controls or steal user and banking credentials.

Technology risks go far beyond financial loss. These attacks often disrupt the ability of local governments to provide essential services. Any delay in dispatching emergency services can have a devastating impact on citizens who need assistance in life-threatening situations. Often after a cyber-breach, the public questions the effectiveness of local officials, and reputations can be permanently damaged.

Technology has become so embedded in local governments that it is no longer possible to operate without strong Cyber Risk Management controls and well-trained staff. At the same time, technology is evolving so quickly that it is hard for local officials to successfully manage their risks before a problem develops. Unfortunately, the typical local government has several generations of computers, different software versions, limited network support and poor back-up systems. Now is the time to rethink technology investments, and how to manage the system to protect your networks from criminal intruders.

Basic Cyber Security

There are two things you absolutely must have in place:

1. A trusted employee or consultant to advise on technology management.
2. Tested back up procedures that restore operating systems and data in the event your technology and access is compromised.

Trusted expertise is critical because there are many back-up solutions, and yours must meet your specific needs. Your advisors can be vendors, employees or even citizens who are involved in the computer industry.

Technology Management

Larger entities typically employ a full-time Information Technologies (IT) Director. Otherwise, systems are the responsibility of a senior manager who depends on an independent consultant.

The person with primary responsibility must:

- Prepare an Annual Technology Plan that includes a cyber risk assessment for the governing body before they establish budget priorities.
- Establish and periodically test a Cyber Security Incident Response Plan.

You should also seriously consider retaining a Cyber Auditor to put an independent set of eyes on your systems.

Whether you have your own technology staff or hired contractors, consider joining the New Jersey Chapter of Government Management Information Sciences (GMIS), an association of local government technology managers. The membership fee is among the lowest of any professional association.

You should also consider joining two services that are free to state and local governments:

1. The New Jersey Cyber Communications and Information Cell (NJCCIC), the state's information security resource.
2. Multi-State Information Sharing and Analysis Center (MS-ISAC), a national Cyber Security support group for governments funded by the U.S. Department of Homeland Security.

Technical Competency

Back-Up Plan: The plan needs to be designed so that you can reasonably recover from mechanical failure, loss of your facilities through fire, flood or other calamity, and ransomware or any other form of malware. Of course, the best hardware, software and facilities are only as effective as the people available to support your technology and respond to security incidents. Therefore, your back-up plan should detail the staff or contractors that are ready to respond when needed.

Security: Servers need to be protected from unauthorized access to secure them from tampering. Servers should not just sit on a table, in an unlocked basement or closet. Access to applications should be limited to those who need it and should be removed immediately when a person leaves your organization or if their responsibilities change.

Software: All computers and networks need to have actively maintained defensive software, such as anti-malware, anti-virus, anti-spam and firewalls. Software needs to be patched with manufacturer updates as soon as possible after they are released.

Cyber Hygiene

The dictionary defines hygiene as "conditions or practices conducive to maintaining health and preventing disease, especially through cleanliness." In this context, health and disease refer to your technology, and cleanliness means prevention.

Training: Your staff is a critical line of defense, and all computer users must understand how to recognize and manage the attacks that they will see. We recommend at least one hour of training every two years, but annual training is even better since the threats keep changing. The MEL produced an excellent video on employee Cyber Security that can be downloaded at NJMEL.org. The MEL has also identified other educational resources you can use to meet this basic requirement.

Password Policy: You need a policy that requires strong, unique passwords, or better, passphrases, that are changed at least annually. The video training material explains how this can be accomplished.

Internet and E-mail Use Policies: A model communications media policy is available at NJMEL.org to help you adopt sound internet and e-mail use policies. It is part of the Model Personnel Policies and Procedures Manual that most towns have adopted.

Personal Information Security: Files with information that criminals are after, such as personally identifiable information or personal health information, need especially strong controls, including unique password protection or, better yet, encryption.

Testing: Periodically test the cyber hygiene by sending e-mails to all computer uses with suspicious attachments to see who falls into the trap.

Financial Controls

Another type of cyber hygiene involves instituting internal financial controls to protect against fraudulent transactions, a.k.a. Business E-mail Compromise. Cyber criminals now try to use e-mail, phones and websites to convince employees to execute financial transactions that involve wire transfers to their direct deposit accounts. Financial control practices must ensure that these transactions receive positive verification of their authenticity before they are executed.

Case Studies

Case Study #1

Facts: A local government used a common network to share and save documents in a central server. An employee was duped by a typical phishing e-mail that included a fake link that deployed two strains of malware when clicked. One of the malware strains was designed to find shared drives and spread across the network. In this case, the shared drive was open to all employees with no segregation, encryption or password protection. As a result, the DPW could access financial records, the Police Department could access Human Resource records and so on. As a result, the malware was able to access all of these confidential and sensitive records.

Result: The event cost over $100,000 in legal and forensics costs. Breach response was engaged to help triage the incident and cyber counsel was retained to handle the legal response. A forensic firm was also engaged to review the files and identify the individuals that needed to be notified. Legal counsel sent these notifications. All costs, subject to the deductible, were included in the insurance coverage.

Comment: While having a shared drive is not an issue itself, the lack of segregation, password protection and user privileges was a serious weakness. The local government should also have deployed document protection for sensitive documents, such as complex password protection or encryption.

Case Study #2

Facts: A payroll manager was performing the annual task of sending employee W-2 Wage and Tax Statements to senior managers. The local government lacked a policy for employee departures, and these sensitive documents with personally identifiable information were sent to former employees.

Result: New Jersey data breach laws require special notifications to the affected individuals. The Breach Coach and cyber council also recommended credit monitoring for all affected individuals. The costs, subject to the deductible, were covered by the insurance.

Comment: Policies should detail procedures for employee departures so that all departments update their records. Employees must be trained, and the policies reviewed periodically.

Case Study #3

Facts: A local government contracted with outside technology and security professionals. The IT contractor was breached, probably using a compromised password. Once in the contractor's network, the attacker was able to breach their clients' networks via the remote desktop connections established by the IT contractor.

Result: The attacker then released ransomware into the networks and demanded between $200,000 and $300,000 in Bitcoin from each of the contractor's 20 clients. Unfortunately, the contractor failed to ensure proper back-ups. The MEL's insurer engaged cyber counsel and forensics for its members.

Comment: Properly vet IT Contractors by requiring credentials and experience. Look into the contractor's own security practices, such as complex and unique passwords, Virtual Private Networks (VPNs) and encryption and unique passwords when remoting into clients' systems. Also, require the contractor to maintain proper insurance.

Case Study #4

Facts: An employee received an e-mail from a popular delivery company during the December holiday season and clicked on the link to check the package delivery. The link downloaded malware to the network that encrypted the police system. The attacker demanded a substantial ransom while rummaging through the police network.

Result: Cyber counsel and forensics were engaged to remediate the breach, and computer equipment was replaced. All costs, subject to the deductible, were covered by the insurance.

Comment: Police have experienced more claims than any other municipal department. If a police computer network is breached in New Jersey, the department must disconnect from the criminal database. As a result, patrol officers are unable to check license plates and criminal records until the system is repaired or replaced.

Case Study #5

Facts: A cyber attacker was able to obtain a municipality's banking information.

Result: The attacker used this information to transfer $500,000 to a fake account. Only a portion of the money was recovered. The insurance policy covered the remaining lost funds and other associated expenses.

Comment: Work with the auditor to institute internal controls that establish a low dollar threshold that requires countersignatures for checks or wire transfers. Set a similar standard with your financial institutions that requires confirmation for transactions.

Conclusion:

The MEL has published minimum cyber risk technology standards that all local governments should implement, available at NJMEL.org. To incentivize the program, members will have a substantially lower deductible if they have complied with these standards.

[258] Much of the material in this chapter is from Marc Pfieffer, former Director of the New Jersey Division of Local Government Services, and Ed Cooney, the MEL's Underwriting Manager.
[259] 2019 Verizon Data Breaches Report

PART 4

OTHER RISK MANAGEMENT ISSUES

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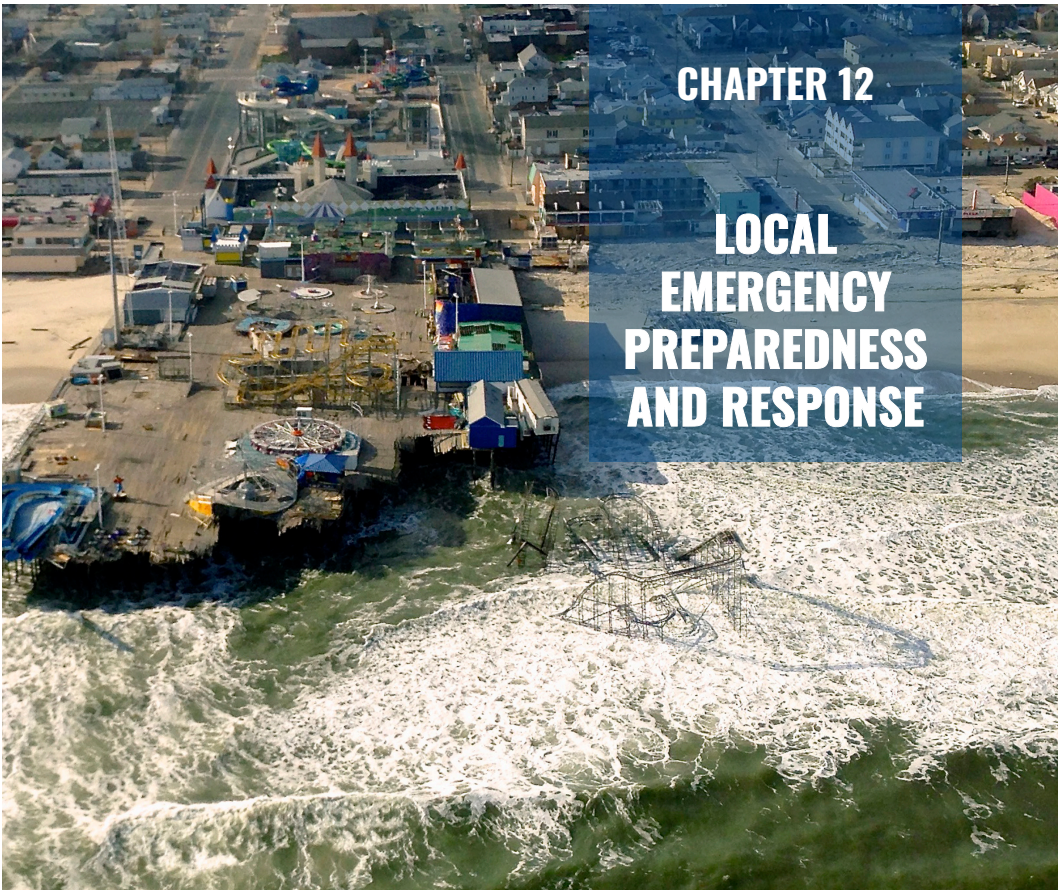


CHAPTER 12

LOCAL EMERGENCY PREPAREDNESS AND RESPONSE

The current emergency management framework evolved from Cold War-era "civil defense" requirements. With the end of the Cold War, the emphasis shifted towards disaster relief, recovery, mitigation, terrorism, cyber threats and global pandemic events. In 1979, disaster-related responsibilities were consolidated into the newly created Federal Emergency Management Agency (FEMA). [260]

State and local governments mirrored the changes at the federal level by adopting an "all-hazards" approach to emergency management. The federal structure continued to adapt to terrorist threats, global pandemics and climate change.

In New Jersey, the most important organization for local officials is the Office of Emergency Management (OEM) of the State Police. State OEM responsibilities include emergency planning, first responder training, organizing large-scale exercises and responding to major incidents focusing on four areas:

1. Severe Weather
2. Hazardous Materials Training and Response
3. Radiological Preparedness
4. Local Emergency Operation Plans Development Process

In the event of a major emergency, the state OEM serves as the principal advisor to the Governor. The State OEM also plays a lead role in collecting damage information, providing technical assistance to applicants, reviewing claims applications, disbursing grants and monitoring expenditures.

Many emergency management functions are delegated to the county and municipal levels by the State. Each county in New Jersey has an Office of Emergency Management to coordinate activities, provide technical support to municipalities and review Emergency Operation Plans.

Mandates and Best Practices

Leadership: State law requires that every municipality appoint a resident as the Emergency Management Coordinator (EMC) for a term of three years. Some communities assign the task to a municipal official with full-time duties, while others assign citizen volunteers or part-time employees. The candidate must be able to provide adequate focus on the responsibilities of the position and obtain the respect of other community leaders, particularly those in public safety professions.

Ideally, the individual should:

- Be experienced in the planning, development and administration of both municipal and emergency response activities, although many of these skills can be acquired through proper training.
- Not have conflicting responsibilities to fulfill during an emergency, such as being an Incident Commander or head of a principal public safety service.
- Not be subordinate to other public safety professionals in other aspects of their employment with the local unit.

The EMC must be recognized as having the authority to declare a "state of local disaster emergency" whenever a disaster has occurred or is imminent. This authority, provided by the New Jersey Emergency Management Act should be codified locally in the municipal Emergency Operating Plan.

In any major emergency, the EMC should be the person coordinating municipal resources. However, the EMC should not be the Incident Commander. This role can be performed by the Police Chief, Fire Chief, or another official specified in the municipal plan. If the right person fills the EMC position and has been adequately trained, the governing body and Chief Executive Officer should be comfortable with the statutory delegation of such authority. In practice, the EMC will issue the declaration only after consulting with the Mayor or Municipal Manager. The significant leadership role of the EMC during a disaster does not diminish the roles of the other community leaders.

Every EMC must complete a home study course and attend a workshop as a condition of appointment. State police guidelines go further by requiring every EMC to complete 24 hours of training annually. Municipalities need to provide adequate administrative and financial support to facilitate this level of training.

EMCs should be encouraged to participate in professional emergency management organizations, especially those that permit networking with Emergency Managers from elsewhere in the nation. EMCs should also be encouraged to obtain professional certifications, such as Certified Emergency Manager and Certified Flood Plain Manager.

Emergency Planning Committee (LEPC): State and Federal law requires every municipality to have a functioning LEPC that meets at least once annually to review the Municipal Emergency Plan. However, the LEPC should meet at least quarterly and ideally, monthly. Elected officials that are not on the LEPC should attend at least one meeting per year to obtain a first-hand exposure to emergency management challenges and resources.

The LEPC should include representatives of all agencies involved in emergency response and recovery, and managers from any high-risk or large industries in the community.

By statute, the group is chaired by the EMC, but other members should include:

- Mayor and/or Municipal Manager
- At least one other Elected Official
- Police Chief
- Fire Chief
- Health Officer
- IT Professional
- DPW Superintendent
- Municipal Engineer
- School Representative
- Construction Official
- Finance Officer
- Media Representative
- Operators of Facilities subject to SARA Title III
- Public Relations Officer (optional)
- Risk Manager (optional)

In addition to reviewing the Municipal Emergency Operations Plan, the LEPC should conduct regular evaluations of community vulnerabilities and review Emergency Plans of any high-risk facilities, including schools and healthcare institutions.

Assuring the active participation of school representatives is a particularly important. School officials are outside of the normal organizational structure of the municipality and are thus at risk of being isolated from the other functions of local government. Schools are Custodians of children and school facilities are commonly designated as shelters, and must be intimately involved in the emergency planning process.

Similar efforts should be made to closely involve representatives from utilities, authorities and other organizations that are not a formal part of the municipal government structure.

Evaluation of Local Vulnerabilities: Disasters are generally categorized as either "natural," meaning caused by a force of nature, or "technological," also called "man-made," which are caused by the failure of a system or piece of equipment, an accident or an intentional act of man.

Disasters can also be classified as either predictable or non-predictable events. For example, a hurricane is now relatively predictable because it can be tracked long before it reaches land. Fires, transportation accidents, chemical releases, terrorism, global pandemics, major incidents of school violence and cyber-crimes, usually occur without warning. In these cases, community officials must rely on established Emergency Plans that, ideally, will have anticipated the course of events. These plans should be incident specific, since a procedure that will work on one type of event may not work for another.

The local emergency planning process begins with a comprehensive analysis of community hazards and vulnerabilities, or likely impacts of those hazards.

Risk	Issues
Terrorism	What community resources or infrastructure could be the focus of terrorist attention?
	Have plans been made for continuity of government operations?
	What steps have been taken to assure citizen and family preparedness?
Flooding	What areas are likely to flood during periods of severe weather, or when drainage systems or dams might fail, including those in neighboring communities?
	What community assets are located in floodplains?
	How vulnerable are municipal records, communications, utilities and other basic infrastructure?
Other	What is the likely impact of a severe hurricane or winter storm?
Transportation	What are the risks posed by major transportation corridors in the community and nearby towns?
	What is the likelihood of an air crash?
	Do pipelines create special risks?
Technological	What facilities in and around the community use or store hazardous materials, and what are the risks?
	If a chemical release occurred, what areas would be affected?
Public Facilities	What are the vulnerabilities of schools, healthcare facilities, high-rise apartments, transportation centers and other sites with large concentrations of people?
Large Fires	What sites, both structures and underdeveloped properties, are particularly vulnerable?
Infrastructure	What is the risk and likely-impact of disruptions to the power supply, water, sewer and other key systems?

The local Office of Emergency Management staff, local emergency and support services and the LEPC must work together to identify the hazards, assess the risks and analyze the implications for the community. This evaluation will provide the foundation for the Emergency Operations Plan (EOP), which will describe how the community is to prepare for, respond to and recover from these major vulnerabilities.

Pandemic	What are the specific equipment needs to ensure the safety of first responders and other municipal employees?
	What plans need to be developed to split or modify work schedules to limit employee and volunteer exposure?
	What sites are potentially high-risk for pandemic spread?
	What issues are associated with response capabilities and resource availability of community emergency management agencies to support healthcare agencies and systems in their response to a pandemic?
Cyber Crime	What governmental systems would be affected and how would you address the issue of government continuity?

Annual Update of the Emergency Operations Plan: The State Office of Emergency Management has standardized the format and organization for municipal EOPs in New Jersey. By law, the EOP must be updated every two years, but an annual review and update is recommended. EOPs are certified by the State Police every four years. The EOP of each municipality consists of multiple chapters or "annexes," with each annex focusing on a key component of the Emergency Management Plan. While the contents will reflect the community's unique characteristics and hazards, every municipal EOP will have the following annexes:

Basic Plan (Executive Summary)
Alert, Warning and Communications
Damage Assessment
Emergency Medical Services
Emergency Operations Center
Emergency Public Information
Evacuation Plans
Fire Services
Hazardous Materials
Public Health
Public Works
Radiological Protection
Resource Management
Shelter, Reception and Care
Social Services
Terrorism

Each community should also consider developing a separate annex with specific plans for any high-risk facilities, such as schools, healthcare facilities, shopping malls, office complexes or high-rise buildings. In today's environment, it is especially important to address cyber-crime and global pandemics. While the State does not require these plans, they will greatly enhance public safety and the preparedness of emergency services.

The plan should be reviewed for functionality after every emergency event or exercise. If responders were forced to depart from the plan, or some assumption proved unrealistic, the problem should be discussed at an LEPC meeting and the plan should be modified accordingly. The municipal EOP should never be viewed as complete, but rather be continually revised to reflect changes in the community and recommended improvements.

The EOP should include plans for assuring the safety of the families of emergency responders. Public safety leaders, staff and emergency responders can only focus on their duties during an emergency when their personal responsibility for their families' safety is assured.

The continuity of government is especially critical in emergency events, with a particular need to identify the line of succession to the office of Mayor/Chief Executive Officer. The plans need to establish both who will lead and how the government will operate under emergency conditions.

Incident Command System (ICS): No matter how much time, money and effort are invested in mitigating risks, developing Emergency Plans and training responders, the risk of a sudden emergency cannot be totally eliminated. When the unthinkable happens, local leaders will face a barrage of questions, including those asking who is in charge, how to respond to calls for assistance, how to inform the public and news media, and what the priorities are.

If the community has an effective Emergency Plan, most of the answers should be found there. How well those plans are put into action will depend on the response team's ability to manage and control the event. The basic approach to incident management that has been adopted by New Jersey and other states is a tool called the Incident Command System (ICS). The State Police has mandated that ICS be the standard command and control system during emergencies, including fires. Federal law requires the use of ICS for hazardous materials incidents and the ICS approach must be incorporated into Emergency Operation Plans. Any local official who may become involved in responding to an emergency, including off-site support personnel, needs to understand the concept.

The approach provides a means to coordinate the efforts of separate agencies as they work to stabilize an incident. Coordination is key because most incidents will require multiple agencies or involve multiple jurisdictions. There must be a coordination mechanism that ensures resources are used effectively, regardless of the size of an emergency or the number or organizations involved.

The plan should only assign tasks, such as hazardous material Incident Command, to individuals who have earned the required certifications. Documentation of these certifications should be readily available.

Emergency Operations Center (EOC): An organizational mechanism is required to establish priorities among the numerous incidents likely to be reported during a large-scale disaster and coordinate the response across the community. That function is performed by the Emergency Operations Center (EOC).

An EOC is where the EMC, department heads, elected officials and volunteer agencies gather to coordinate the response. It is normally activated only for large, area-wide events, such as those caused by severe weather and major technological incidents. The space is designed to provide the logistical tools and supplies required to manage the disaster properly. Every department that plays a role in managing the event should have a representative in the EOC with authority to make decisions for their Agency. All EOC personnel should be trained in its operation, and ideally, will have participated in EOC activation exercises.

Drills and Exercises: State regulations require each municipality to conduct one drill or exercise annually. The drill should be designed with particular goals in mind or should test specific chapters of the Municipal Emergency Plan, and should involve both volunteer and career responders. Any weakness revealed by the drill should result in plan changes.

The State OEM recommends testing seven annexes per year. These exercises can vary in complexity.

- The first and simplest involves an individual organization, such as the fire department or rescue squad, practicing its particular function. In most communities, emergency services conduct drills throughout the year.
- The next step is the "tabletop" exercise, in which Agency representatives, assembled in a command center, are asked to respond to various scenarios in a simulated emergency.
- A third testing option, the "functional exercise," is conducted in the field and involves various organizations practicing one or more coordinated activities, such as a large-scale evacuation.
- The fourth and most extensive test is the "full-scale" exercise, which draws on all or most annexes and organizations. Such exercises can be expensive but are the most effective test short of a real emergency.

Town-Wide Alert System: Every community's response capabilities need to include an effective method of conveying meaningful information to the public. In the event of severe weather or a major technological incident, whole neighborhoods, or even an entire community, may need to be evacuated on very short notice. The people at greatest risk need to be contacted and told what to do and where to go, sometimes within minutes. In less threatening situations, Emergency Managers may be required to convey important public safety information to residents so preventive measures. New technologies offer a range of options that should be evaluated.

Financial Planning: Whether approached incrementally or more systematically, the municipal budget is a reflection of a community's values and priorities. If emergency planning is to be seriously considered, it will have an impact upon the local budget.

The local operating budget should reflect compensation for the EMC, provide for training, reflect funding needed to upgrade equipment and systems and provide for the mitigation of threats. Inter-governmental aid is available to help reduce the impact on local tax rates.

Local purchasing ordinances and procedures should anticipate the need for emergency requisitions of supplies and services. New Jersey law permits local emergency purchases without formal bidding.[261] The EMC should be familiar with these procedures and have written guidelines and access to the municipality's Contracting Officer.

Coordinating planning with neighboring communities may also create opportunities for sharing resources.

[260] Much of the material in this chapter is from Chuck Cuccia, long-time MEL Commissioner and CFO of Maywood.
[261] *N.J.S.A. 40A:11-6*

CHAPTER 13

CRISIS COMMUNICATIONS

Norris Clark, of Princeton Strategic Communications Group, authored this chapter.

In the last chapter, we discussed that the Emergency Manager must be in a position to coordinate all aspects of local government's response, including communications. The Crisis Communications Plan must clearly designate the spokesperson and who is responsible for preparing the content. After being elected, every official must become fully versed in this plan and their role within it.

Case Studies:

Hurricane Katrina: On August 29, 2005, Hurricane Katrina began a chain of events that would devastate and flood the city, breach protective levees, claim thousands of lives across the Gulf Coast, force over 100,000 people into exile, and severely tax the resources of New Orleans, the state of Louisiana and the federal government. [262] A study of the disaster by Terry W. Cole and Kellie Fellows found that fundamental failures in risk communications contributed to the storm's consequences:

- The government's unfulfilled promises and lack of attention to the risks associated with a major hurricane damaged its credibility and caused residents to become apathetic about the risks.

- The messages, and those who conveyed them, compounded the problems by delivering conflicting and confusing messages about the impact the storm would have on the city's levee system.
- While 90% of those who had the resources and means evacuated the region, approximately 70,000 either did not or could not evacuate. Those who heard evacuation orders may have presumed it was not mandatory because of perceived negative consequences, unclear messages from officials or lack of knowing how to evacuate.
- The evacuation language was vague and uncertain even up to hours before Katrina made landfall. Evacuation levels varied from Parish to Parish and avoided using the term "mandatory."
- The spokespersons lacked credibility with the African American population, particularly as a result of the government's failure to assist with evacuation during Hurricane Ivan in 2004. With Katrina, "previous communication had warned of levee failure and massive flooding, yet the evacuation plan did not take residents out of the city but to a facility that was already becoming surrounded with floodwaters."
- Despite warnings and expressions of danger, neither the City nor the State implemented Evacuation Plans for all New Orleans citizens. No information was disseminated to specify how individual citizens or Parish officials should execute the evacuation.

Sonoma County: On October 8, 2017, 100,000 people were displaced, 5,000 structures destroyed and 25 people killed in California's most destructive wildfire to that date.

- While the county had a public alert and warning system in place, procedures for using them were "uncoordinated and included gaps, overlaps and redundancies," according to a state review team.
- The state's review team found that the Sonoma County emergency staff failed to prepare for the wildfires and had outdated technology, disorganized emergency alerting protocols and undertrained staff.
- Gaps in the county's Disaster Communication Plan pointed to a lack of trust. "Alert operators did not trust their ability to issue public warnings because of their lack of training with the system, incident commanders did not trust the WEA capabilities of their notification system to properly alert local residents, and emergency services leaders did not trust the emergency action plan to evacuate residents safely."

A Crisis Communications Plan must also address potential issues that go beyond events that fall under the Emergency Manager's responsibilities, for example:

San Rafael Smoking Ban: In November 2013, the City of San Rafael, California, enacted one of the nation's toughest smoking bans prohibiting smoking in all residential units that share a common wall. Prominent groups, including the American Lung Association and the March of Dimes, supported the legislation. However, the city was criticized in columns, comment sections and on social media for government overreach. The law generated national news coverage by media sources, including ABC News, Huffington Post, Fox News and UPI. One conservative Southern California columnist asked, "Will the government reward children for turning in their smoking parents? Will smokers need to cover their windows to hide their habits from authorities?"

Burlington Social Media Account Dismissal: In December 2019, the acting police chief of Burlington, Vermont, was replaced just hours after her appointment for operating a social media account under a fake name on which she discussed the Police Department. She was appointed to replace the former chief who resigned after admitting that he used an anonymous Twitter account to troll a critic. The city's Mayor was quoted as saying, "The disclosure raises the possibility that problematic social media use is far more widespread within the department than previously understood."

Developing a Crisis Communications Plan:

Most local governments need two related plans; one for issues that fall under the scope of the Emergency Management Coordinator (EMC) and a second to respond to other issues. The individual responsible for communications will probably be the same, but this individual may report to different officials depending on the type of crisis. Where the EMC is involved, the Communications Director should be a part of the Local Emergency Management Planning Committee (LEMC). Otherwise, the Communications Director will report to either the local government's top elected official or CEO. In either case, advanced planning is essential to enable the Communication Director to spring into action immediately. These plans must consider the wide range of possible crisis events, including:

- **Natural:** Hurricane, Blizzard, Tornado, Flood or Pandemic.
- **Man-Made:** Environmental Issue, Chemical Release, Infrastructure Failure or Equipment Malfunction.
- **Facilities:** Explosion or Fire, Structure Collapse, Major Contamination or Mass Internal Computer Issue.
- **Criminal:** Official Misconduct, Terrorism, Data Breach, Violence, Sexual Harassment, Angry Constituent(s); Bomb or Bomb Threat or Civil Disturbance.
- **Legal or Regulatory:** Major Lawsuit or Regulatory Change.
- **Human Resources:** Labor Issues or Loss of Key Official(s).
- **Reputational:** Social Media Crisis, Data Breach of Confidential Information, Misconduct of Management or Employee or Major Lawsuit.
- **Proximity Crisis:** Unrelated to the municipality, but close enough to have an impact.

Communications Planning: Begin developing the Communications Plan by determining who will be in overall command for each scenario and who will be the Incident Commander. Then, identify what staff needs to be involved. The plan should also determine what the immediate communications needs are, including:

- What is the potential public impact or interest?
- Who will be affected and how?
- What emotions need to be considered?
- What will the public be asked to do? For example, evacuate, shelter in place or avoid a location.

- What information is needed, and who, beyond the staff, need to receive it? When will it be available?
- What can and can't be said?
- Is legal counsel needed?
- Who will communicate the response as the spokesperson?
- How will the response be communicated?
- What media, legislators or other stakeholders will be contacted, and in what order of priority?
- Does the issue have traction? Will it become anything more than a blip on the news?

The Communications Director must develop factual, responsive messages to be used by the organization and its representatives. All media and public inquiries should be referred to the authorized spokesperson for comment; other staff should be professional and helpful by connecting them with the spokespeople, but will neither speak to the media nor provide any information.

Do not release information until the person who has overall control of the crisis reviews the situation and authorizes the strategy. Quickly craft "holding statement(s)" for delivering interim responses to the media to demonstrate that local government is taking ownership and not "stonewalling" or being uncooperative. Important crisis communications rules include:

- "No comment" is never an acceptable response. If an answer is unknown or cannot be immediately answered, make a note of the question and tell the inquirer you will get back to them. Be sure to follow through. If the question cannot be answered due to a policy, such as sharing personnel information or HIPAA, politely inform the inquirer.
- Personnel matters are to remain confidential except as required by the Open Public Meetings Act and the Open Public Records Act.
- Communicate the scope and significance of the problem(s) before promoting the solution. Once the solution is being implemented, communicate what's being done to resolve the crisis. Avoid speculation or placing blame when little is known about the origins of the crisis. Instead, focusing on mitigating the crisis and protecting public health and safety.
- Remain in constant contact with key stakeholders, especially with schools, utilities, hospitals and neighboring communities, if they could be affected.
- Without guessing or speculating, create realistic and honest expectations of the actual risk, what the public can expect and whether protective actions are required. Do not communicate unverified numbers, such as records accessed, people injured or cost projections. Quickly correct or clarify inaccurate and misleading statements.
- When possible, and where their expertise is unique or pertinent to the crisis or response, involve independent third parties.
- Ensure the response effort is visible throughout the crisis. Anticipate the needs of journalists, especially timeliness.

- Designate a liaison to stay in touch with the families of victims. Show empathy for people and place their concerns above costs
- Ensure that the quality of the communications itself does not become an issue. Stay on message. Never make accidental news.
- At the end of the crisis, conduct a post-mortem evaluation: What worked well and what didn't? Were there any points of confusion? How can they be resolved?

Staff Notification:

Employees have frequent contact with residents because of their job duties. As soon as practical, the Communications Director should relay situational information to employees who are not directly involved with the emergency response. If the crisis occurs when staff is not in the office, and disseminating the information is either critically time-sensitive or regards the safety of the office building, a phone or text message "tree" should be used to communicate the information to staff. Affected staffs' needs and input on the situation should be taken into consideration. Remind staff that they are not authorized to comment and should refer all inquiries from media, neighbors and others to the designated spokesperson.

Record Keeping:

Document critical conversations, decisions, details and media questions regarding the situation to effectively evaluate crisis communications management and preserve a record in case of litigation.

Conclusion:

The National Center for Environmental Health, Centers for Disease Control and Prevention (CDC) deals with crises situations such as infectious disease outbreaks, natural disasters and severe weather, bioterrorism and chemical and radiation exposures. They know from experience that the right person delivering the right message at the right time, can save lives. Their planning emphasizes six vital communications principles:

1. Be First: Crises are time-sensitive. Communicating information quickly is crucial because the first source of information often becomes the public's preferred source.

2. Be Right: Accuracy establishes credibility. Information can include what is and isn't known, and what is being done to fill in the gaps.

3. Be Credible: Honesty and truthfulness should not be compromised during crises.

4. Express Empathy: The harm and suffering caused by crises should be acknowledged in words. Addressing what people are feeling, and the challenges they're facing builds trust and rapport.

5. Promote Action: Giving people meaningful tasks calms anxiety, helps restore order and promotes a sense of control.

6. Show Respect: Respectful communication promotes cooperation and is particularly important when people feel vulnerable.

[262] Southern Communication Journal, October 13, 2008.

CHAPTER 14
COMMUNITY SAFETY

While Risk Management initially focused on issues that impact the insurance budget, it quickly expanded into other exposures that can affect the organization.[263] In 2013, various JIFs and other interested governmental organizations created the non-profit New Jersey Safety Institute to provide information to local officials about these issues. The Institute's website, NJSafetyInstitute.org, is a comprehensive resource center.

While tremendous strides have been made in reducing some types of accidents in the United States, the overall rate of accidental fatalities has increased 40% since 2000 to 49.0 fatalities per 100,000 population. Accidents cost the country over $1 trillion annually, the equivalent of 5.3% of the gross national product or $3,175 for every man, woman and child in the country. At $472 billion, "Home and Community" is the most expensive accident category, followed by "Motor Vehicle" at $433 billion and "Work Accidents" at $165 billion.[264]

Municipalities, Counties and Boards of Education are on the front line for many serious safety issues that impact the public. New Jersey has the thirteenth-highest pedestrian accident rate in the country, for example. While there was previously a steady reduction in motor vehicle fatalities, the accident rate is now increasing because of distracted driving, including the use of cell phones. Safety and health issues of an aging population have put a tremendous burden on emergency responders at a time when budgets are tight. Another concern is concussion injuries arising from sports and recreation programs.

Officials at every level must be included in the solution to these problems. Priorities are determined by what interests leaders. A safety program must be given constant attention to be successful, and its status should be a recurring item on the governing body's regular workshop agenda.

Community Safety Issues:

Sports

Each year more than 750,000 Americans are injured during recreational sports with brain injuries causing more deaths than any other sports injury. Too often, concussions go untreated because few symptoms are visible to casual observers, and an athlete may experience considerable pressure from spectators, teammates and coaches to resume playing. Multiple concussions over time may result in cumulative damage, and repeated concussions over a short period may lead to Second Impact Syndrome.

Signs of Brain Injury: While most brain injuries do not involve loss of consciousness, whenever an individual loses consciousness, the brain has suffered an injury. Therefore, it is essential for a coach to keep a player presenting any signs or symptoms of a concussion out of a game.

The term "concussion" is often used in medical literature as a synonym for "a mild traumatic brain injury." If a concussion is managed appropriately, the prognosis for complete recovery is good. The hallmark signs and symptoms of a concussion are confusion and amnesia, often without any preceding loss of consciousness. The amnesia generally involves loss of memory of the traumatic event, and frequently includes loss of recall for events immediately before or after the head trauma. An athlete with amnesia may be unable to recall details about recent plays in the game or details of well-known current events in the news. Amnesia also may be evidenced by an athlete repeatedly asking a question that has already been answered.

Training: The Rutgers SAFETY Clinic course includes training on sports concussions and the Center for Disease Control (CDC) has a free online training program that produces a certificate upon successful course completion. All coaches, referees and other officials involved in sports activities should be required to complete at least one of these courses, or a similar kind of course, and submit documentation for the town's records. Parents should also be encouraged to take a course. The CDC online training program [265] can be accessed through the Safety Institute's web site.

A recent study of concussions in high school quantified the relative concussion risk in various sports based on the number of Athlete Exposures (AE), defined as one athlete participating in one practice or one competition. The study concluded: [266]

1. Football	10.40	6. Wrestling	4.83
2. Woman's Soccer	8.19	7. Women's Lacrosse	4.22
3. Ice Hockey	7.69	8. Men's Soccer	3.57
4. Men's Lacrosse	4.92	9. Cheerleading	3.26
5. Women's Basketball	4.85	10. Women's Volleyball	3.14

Football: In any given season, 10% of all college players and 20% of high school players sustain brain injuries. Football players with brain injuries are six times as likely to sustain new injuries. To reduce the risk of concussions:

- Match players according to size, weight and training in contact drills.
- Limit tackling and blocking routines during practice.
- Emphasize "keeping the head out of football," or not butt-blocking using the head.
- Never face or head tackle!
- Train consistently and properly, including exercises recommended for strengthening the neck and shoulder muscles.

Soccer: About 5% of soccer players sustain brain injuries, which may occur from head-to-head contact, falls or being struck on the head by the ball. Girls are injured more often than boys. To reduce the risk of concussions:

- Heading, or hitting the ball with the head repeatedly is the riskiest activity, and should be discouraged, especially by younger players. The risk is greater if a small child uses too large a ball.
- Collision with other players should be discouraged and avoided.
- Younger teams should use the appropriate size and weight ball during practice and games.
- Goalposts should be padded and properly anchored to the ground.

Baseball: The head is involved in more baseball injuries than any other body part, with nearly half of the injuries involving a child's head, face, mouth or eyes. The leading cause of injury and death is being hit by the ball and the second leading cause is collision.

"Janet's Law": Requires public and non-public schools to have automated external defibrillators (AED) for youth athletic events:

- The AED shall be located within reasonable proximity of the gym or athletic field.
- The AED must be available in an unlocked location with an identifying sign.
- The AED must be accessible during the school day and any other time a school-sponsored athletic event or practice is taking place.
- A coach, trainer, staff member, EMT or first responder trained in CPR/AED must be present during the event or practice.
- Schools must develop an Emergency Action Plan for responding to sudden cardiac arrest events. This plan must include: who gets the AED, who calls 9-1-1, who starts CPR and uses the AED and who assists rescuers getting to the victim.

Playground Safety

Over 200,000 injuries are reported each year on playgrounds in the United States. The Consumer Product Safety Commission (CPSC) developed the playground safety standards (Publication 325) adopted by New Jersey, which can be found at NJSafetyInstitute.org and NJMEL.org.

Initial Inventory: Retain a professional to inventory existing playgrounds and evaluate compliance. The inventory should be updated whenever there are major changes. Specifically identify the different pieces of apparatus, their manufacturer, date of manufacture, location and age-appropriateness, and details on the protective surface. A separate file should be established for each playground.

Annual Audits: At the beginning of the year, review the file and perform a detailed physical examination of each playground. The audit should be the responsibility of someone who has received the necessary training. All repairs should be made before opening for the season. A similar audit should occur at the end of the season to begin planning for the following year.

Weekly Inspection: Inspections should be conducted at least weekly, or more frequently depending on usage, by maintenance personnel specifically trained to identify hazards and initiate repair procedures. If the repair cannot be performed on-site, the apparatus should be taken out of service until it is satisfactory. All inspections and corrective actions should be documented.

Bicycle Safety

Bicycle helmets are between 85% and 88% effective in preventing brain injuries. Universal use of helmets could prevent one death per day and one brain injury every four minutes. More children between ages of 5 to 14 are injured in biking accidents than in any other sport. In fact, 550,000 people, including 350,000 under the age of 15, are injured in bicycle accidents each year, and 900 people, including 200 under the age of 15, are killed. Bicycle incidents are most likely to occur within five blocks of home, with almost half occurring in driveways and on sidewalks.

New Jersey requires that children under 17 years of age wear helmets while bicycling, in-line skating and participating in other wheeled activities.

Senior Citizens

Physical changes in older individuals make them more vulnerable to injury and reduce their chances of recovering.

- Slips and Falls: Falls are the leading cause of injury deaths among seniors, and more than a third of adults ages 65+ fall each year. Falls are also a major cause of disabling injuries that permanently restrict the mobility of seniors. Almost two million seniors are treated in emergency departments for nonfatal injuries from falls each year, and more than 400,000 are hospitalized. The rate of fall-related deaths has increased significantly over the past decade.
- Motor Vehicles: Seniors today are mobility-minded and elect to drive longer. Some, however, are unable or unwilling to assess their driving capabilities.
- Pedestrians: Seniors have the highest pedestrian fatality rate of any group, accounting for 18%. Seniors often have difficulty hearing or seeing cars and are especially vulnerable at intersections because they need more time to cross the street.
- Suicide: Suicide among the elderly is becoming an increasing problem, and high rates of alcohol involvement have been found among individuals who commit suicide.
- Fire: Older adults suffer twice as many fire deaths as the general population. People ages 85+ are four times as likely to die in a fire than other groups. The elderly need more time to escape from a fire area and may need others to assist them in order to evacuate safely.

Addressing the Issue: Begin by compiling your community's accident rates and talk to the Police, Fire, Ambulance and Health Departments about the issue. Reach out to senior groups and seek their views on questions such as:

- Are there particular intersections that need safety improvements to accommodate the needs of senior adults?
- Where should sidewalks be improved?
- What other services can the community provide seniors?

In addition to the New Jersey Safety Institute, numerous organizations provide educational material, including the Brain Injury Alliance, the Center for Disease Control (CDC) and the National Highway Traffic Safety Administration (NHTSA).

Opioid Epidemic

Drug-related fatalities increased five-fold in the United States, from 12,700 in 2000 to 62,100 in 2008,[267] New Jersey is one of the states hit hardest by this crisis, with 1,409 opioid-related deaths reported in 2016, equivalent to 16 deaths per 100,000 compared to 13.3 nationwide. The New Jersey rate almost doubled to 30 per 100,000 in 2018. [268]

The New Jersey Division of Consumer Affairs within the Attorney General's Office established a prescription monitoring program that collects data on controlled substances being dispensed to fight this crisis. Pharmacies are required to report information daily, and Pharmacists use this data to review the patient prescription history and identify potential abuse. As a result, New Jersey providers write 25% fewer opioid prescriptions per capita than the national average. Yet, the per capita opioid fatality rate in New Jersey is still 38% higher than that of country-wide figures. [269]

Because the strict law enforcement strategy has proven unsuccessful, several counties [270] have developed coordinated law enforcement and social services strategies to combat opioid addiction. Many people do not seek help because they are fearful of being arrested. In 2013, the "Overdose Prevention Act" created immunity from arrest for drug use or possession when a person, in good faith, seeks medical assistance for him/herself or another who is experiencing an overdose. The initial success of these programs prompted Attorney General Gurbir Grewal to establish the Office of the New Jersey Coordinator for Addiction Responses and Enforcement Strategies ("NJ CARES") to combat opioid addiction on multiple fronts.

Operation Helping Hand: Under this approach, law enforcement combines with community health agencies to engage individuals suffering from addiction and facilitate access to treatment and recovery services. Police are especially important because "A person with serious mental illness is more likely to encounter a police officer than a psychiatrist or substance abuse counselor." [271]

Morris County Sheriff James Gannon launched Hope One Outreach and Helping Hand, a pilot program that uses an unmarked van to seek-out addicts and family members. The team includes a sheriff's officer in plain clothes along with a mental health clinician and certified Peer Recovery Specialist. The van usually travels to public places around the county, such as shopping center parking lots. The team is low key and can immediately arrange transportation to a treatment facility. The County Department of Social Services helps people access a wide range of benefits, such as food stamps, nutritional assistance, health care, utility assistance, child support and cash assistance through the companion program, Navigating Hope.

Local police agencies participate through the Police Assisted Addiction and Recovery Initiative (PAARI). Under this program, individuals can come to the Municipal Police Department to be immediately connected to recovery programs without fear of arrest. [272] Individuals in need of treatment that are arrested for another crime are assigned to the "Hope Wing" of the County Jail, allowing treatment providers to come into the correctional facility and provide intensive counseling. The program continues under the Re-Entry (Star) program after the inmate has been released. [273]

Local police agencies have also installed prescription disposal drop boxes in municipal complexes.

Continuing Education Partnership with Rowan University: The New Jersey Opioid Medical Education Program is a continuing education initiative that helps healthcare professionals, including physicians, nurses, veterinarians, psychologists, social workers and athletic trainers, satisfy the State's requirement for one hour of continuing education on prescription opioid drugs every two years. The curriculum includes evidence-based information on responsible prescribing practices, alternatives to opioids for managing and treating pain and the risks and signs of opioid abuse, addiction and diversion. As part of its agreement with NJ CARES, the Rowan University School of Osteopathic Medicine prepared six one hour educational videos.

Integrated Drug Awareness Dashboard (IDAD): The IDAD enables officials from across the Department of Law & Public Safety to exchange opioid-related data that had previously been kept separate within each agency. Data available through IDAD includes the number and types of prescription opioids being dispensed and the locations of heroin, fentanyl and other opioid-related arrests.

Pedestrian Safety

Approximately 70,000 pedestrians are injured and more than 4,000 killed in motor vehicle related accidents in the United States each year. Pedestrian accidents are caused by a combination of physical and human factors. Pedestrian accidents, for example, are more frequent in urban areas, but more likely to be fatal on rural roads. Children are also disproportionately involved.

Age as a Factor

- The frequency of accidents for children under the age of five is relatively low, but the accidents are often fatal. Each week, two young children are tragically killed by reversing vehicles. Children are especially vulnerable to accidents in driveways. One such type of accident is known as "bye-bye" syndrome, which involves a child running towards a car, 70% of the time the car is being driven by a parent or close relative.
- The accident rate increases significantly beginning at age five because children begin to explore their neighborhood. A significant contributing factor is the inability of young children to locate a moving object through hearing, known as auditory localization, which typically doesn't develop until age nine or ten. As a result, young children are not aware of traffic unless they are looking directly at a vehicle. One of the most common types of accidents in this age-group is the "mid-block dart out." Because children lack auditory localization, they tend to impulsively run across the street without stopping to look. Parked cars often complicate the situation by hiding a child from the passing motorist until it is too late to stop.
- Children become more mobile by age ten, and the accident rate increases accordingly, with children experiencing significant numbers of accidents at intersections and in parking lots.

- Drugs and alcohol become a factor in pedestrian accidents starting at age 16. Teens and people in their early 20s are more apt to partake in risky behaviors because the area of the brain that cautions against these behaviors is not yet fully developed. The pedestrian accident rate does not drop significantly until the brain has fully matured, usually in the mid-20s
- The overall accident rate drops at age 25. However, this is deceptive because people walk less as they age.
- The pedestrian fatality rate, as opposed to the overall accident rate, peaks for those 75 to 84 years of age. Seniors are far more likely to be seriously injured or killed in a pedestrian accident than young people. They are especially vulnerable in intersections because they cannot cross the street quickly and often fail to notice vehicles in turning lanes. Peripheral vision and auditory localization skills decrease as people age, further increasing the vulnerability of older adults to pedestrian accidents.

Speed and Distracted Driving

Increased speeds put all pedestrians at risk. If a car going 20 mph hits a pedestrian, there is a 95% chance the pedestrian will survive. However, the survival rate decreases to 45% when a vehicle is traveling 30 mph and less than 10% at 40 mph. Reducing speeds in residential and business districts must be a priority in any pedestrian safety campaign.

Distracted driving is also a frequent contributing factor in pedestrian accidents. In 80% of all accidents, the driver was looking away from the road or doing something else for at least three seconds prior to the accident.

Research has determined that 11% of all motorists are talking on cell phones at any time. The use of a cell phone, even hands-free, quadruples the risk of an accident. Cell phones and other electronic devices are also a problem for pedestrians. A Los Angeles study found that pedestrians talking on cell phones take longer to get to the opposite side when crossing and are less likely to look for traffic.

Solving the Problem

Evaluation: The process of making your community "pedestrian-friendly" begins with an evaluation of your community's experience. To identify accident "hot spots" in the community, start by reviewing pedestrian accident reports and marking their location on a map. Visit these locations to get a better understanding of how the accidents occurred.

Research has identified the following reoccurring accident factors:

- Intersections with two or more lanes in each direction have significantly more pedestrian accidents than intersections where there is only one lane in each direction.
- Left turning vehicles are involved in more pedestrian accidents at "T" intersections than standard "X" intersections because they have no oncoming traffic to delay their turn at "T" intersections.
- Two-way streets have significantly more pedestrian accidents than one-way streets.

- Sun glare is a contributing factor at intersections facing certain directions, particularly at certain times of the year.
- Terrain is another factor. Intersections on downhill grades are prone to speeding while those on uphill grades are prone to sun glare.

Mark speed limits on the map, noting where they change. Motorists are less likely to obey lower residential and school zone speed limits on roads where the speed limit was higher just before these "slow" zones.

Locate major walking routes. It is a good idea to walk these routes and identify issues, such as missing or damaged sidewalks, overhanging shrubbery and other hazards. Look for telltale signs that sidewalks are needed, such as places where pedestrians have worn a path by the side of the roadway.

Place school locations on the map, trace the walking routes to them and locate Crossing Guard stations. School zones have emerged as a significant pedestrian safety problem. Forty years ago, 50% of children walked to school. Today, 46% are driven by parents, 40% ride the school bus and only 14% walk. School zones are clogged with far more traffic than they were designed to handle. This is why school officials and parents must be included in the community safety program's planning and implementation.

Finally, ask for public input from senior citizens and youth organizations. Where do they congregate, and what problems do they experience when walking in the community?

Engineering: Armed with this information, study possible engineering solutions. Traffic engineering is complex, and the solutions that are appropriate in one situation may not work in another.

Recent research questions the effectiveness of many common pedestrian safety practices. Most pedestrian crossing signals, for example, are set so that when the light turns green, both pedestrians and traffic are allowed to go at the same time. Research shows that this timing sequence does not result in fewer accidents in many situations.

Research also shows that the effectiveness of pedestrian crossing signals can be improved by changing the sequence for pedestrians so that it is different from the timing for motorists. In some cases, pedestrians are released first, or vice versa, depending on the particular configuration of the intersection. In another variation, pedestrians are only allowed to cross when traffic is stopped in both directions. The decision on how to change the sequencing of traffic and pedestrian signals requires professional evaluation.

Researchers have also determined that merely painting crosswalks is not effective by itself. A community must go beyond painting lines. Coupling crosswalks with pedestrian crossing signs, especially on roads with only one travel lane in each direction and congested business zones, help to alert motorists. All school crossing stations should have these signs at a minimum.

Some studies have concluded that painting crosswalks at intersections with two or more travel lanes in each direction can actually increase the risk of pedestrian accidents unless other safety features are installed. The problem is that pedestrians are subject to multiple threats. In one common sequence, a car in the curb lane stops to let a pedestrian cross, but the car in the next lane does not stop and hits the pedestrian emerging from in front of the stopped vehicle. One possible solution is placing the stop line at least 20 feet before the crosswalk. Where multiple threats are an issue, seek the assistance of a professional Traffic Engineer.

Serious consideration should be given to installing a pedestrian island or refuge for multi-lane roads so that walkers can safely stop halfway across the intersection. This allows pedestrians the opportunity to check for vehicles coming from the opposite direction before finishing their crossing and gives slower pedestrians that need additional time, such as senior citizens, a place to wait safely until the next light cycle.

Research also shows that properly engineered mid-block crosswalks are effective, especially where there are substantial concentrations of senior citizens. The advantage of mid-block crossings is that pedestrians do not have to contend with complicated vehicle turning movements.

"Traffic calming" involves physical measures to reduce traffic speed to improve safety and livability. In the United States, "traffic calming" was practiced as early as the late 1960s and early 70s in places like Berkeley, California, Seattle, Washington and Eugene, Oregon. Properly designed speed tables can reduce accidents by over 40%.

Traffic can also be slowed by visual treatments that appear to narrow the roadway. Engineers call this a "roadway diet." This can be achieved by paving the shoulder with a different color material or painting a line that appears to narrow the traveled portion of the road.

Traffic calming can be especially effective if designed into a project at the design stage, for example, extending the curbs at intersections. Many communities have also retrofitted curb extensions to slow traffic.

Many pedestrian accidents occur in parking lots. Because the number of parking spaces often limits the size of a new building, developers try to squeeze in as many parking spaces as possible with little thought given to pedestrian circulation. Planning and Zoning Boards must be the town's first line of defense against this practice. All parking lots should have clearly marked pedestrian walkways and diagonal parking should be considered wherever possible.

Transit bus stops are another area with high concentrations of pedestrian accidents. The classic bus-related accident involves a pedestrian who crosses the street in front of a stopped bus into the path of a passing car coming from the rear. Too often, neither the motorist nor the pedestrian sees each other until it is too late.

Work with the appropriate authority to engineer safe bus stops that do not impede traffic. For example, place bus stops after the crosswalk so that motorists passing the bus from the rear can see pedestrians in the crosswalk.

Education: Police Departments often have a Community Resource Officer who conducts educational programs for children. Safety training should also be offered to senior citizens, both as drivers and as pedestrians.

The position of School Crossing Guard has become one of the most dangerous occupations in local government. There is a high frequency of accidents in which the Crossing Guard become the victim. Many School Crossing Guards are senior citizens who are at a higher risk of danger due to losses in hearing, eyesight and general mobility. Many accidents also occur at times when inclement weather restricts visibility for both motorists and Crossing Guards.

Each crossing station should be periodically inspected by the Municipal Engineer and Police Department to determine what can be done to improve visibility and slow traffic. It is also critical to consider visibility issues caused by sun glare at different times of the year.

Enforcement: Police Departments must take a leadership role in addressing pedestrian safety. Your community should have a reputation for strictly enforcing traffic laws, such as speeding and distracted and impaired driving. [275]

Stop arms are now nearly universal on school buses and have been highly effective in reducing the number of motorists that fail to stop. However, strict enforcement is essential because children will assume motorists will stop. Ignoring a stopped school bus must be treated as a very serious traffic offense to better ensure motorist compliance.

Ice cream vending trucks are also required to have stop arms in New Jersey. Each community should adopt an ordinance limiting vending trucks to streets with low-density traffic. A model ordinance is available at NJMEL.org.

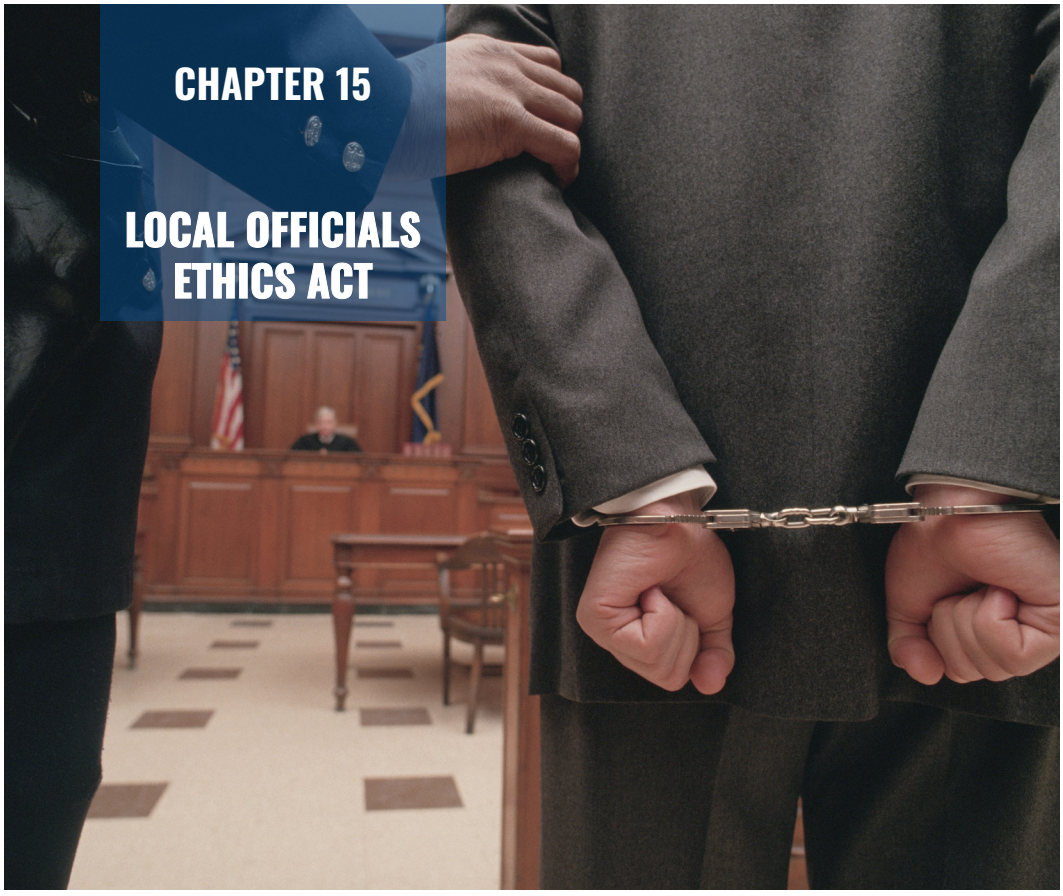
Towns that ban overnight on-street parking in residential zones report substantially fewer mid-block pedestrian accidents. A nighttime ban also results in less daytime parking, reducing the risk that a motorist's vision will be blocked by parked vehicles. These ordinances must be enforced to be effective. Unfortunately, some communities are unable to prohibit overnight parking on municipal streets because many older residential zones were built without adequate off-street parking. "Traffic calming" and educational programs are more important where on-street parking is permitted.

[263] The broader concept is known as "Enterprise Risk Management."
[264] https://injuryfacts.nsc.org/
[265] http://www.cdc.gov/concussion/HeadsUp/online_training.html
[266] Kerr, Zachary, et. A., Concussion Incidence and Trends in 20 High School Sports, High School Pediatrics, 2019
[267] https://injuryfacts.nsc.org/
[268] https://www.drugabuse.gov/opioid-summaries-by-state/new-jersey-opioid-summary
[269] National Institute on Drug Abuse, May 2019
[270] Notably Morris and Bergen
[271] Robert Davidson, Executor Director, Mental Health Association of Morris and Essex Counties
[272] Camden County implemented a similar program, Operation helping Hand that was started in 2014 by Gloucester Township.
[273] McMann, Marcy, The Continuum of Hope, New Jersey Lawyer, February 2020

[274] The mind is similar to a computer and can process only so much data at one time. Even if you are not distracted, your mind can not process all of the information it receives while driving. Talking on a cell phone puts the brain into information overload and makes it impossible to safely operate a vehicle. For example, research shows that a motorist on a cell phone tends to look only straight ahead and stops scanning the road. This results in the loss of peripheral vision, and the driver often fails to see things coming in from the side, such as a pedestrian or another car. Texting is even more dangerous because motorists literally take their eyes off the road and their hands off of the steering wheel.

[275] The Gloucester Township New Jersey Police established a Safe Area Review (SAR) program that was implemented whenever there was a report of a pedestrian safety issue or a pedestrian accident. Some of the major components included:

- Check regulatory and traffic sign condition (speed limit, watch children, etc.) to ensure they are in proper condition.
- Review available files and ordinances to ensure that signs that are supposed to exist are still there.
- Compare existing state law and/or local municipal code to ensure that the posted speed limit signs are legal and supported by state law or local ordinance/regulation. It is often found that a sign, even a speed limit sign, that has no legal backing was installed by Public Works many years ago.
- Ensure highway paint, including center lines, shoulder lines and crosswalks, are in good condition.
- Complete a streetlight check. Have the area checked at darkness to determine if any streetlight bulbs need replacing and document the request for them to be repaired. There are meters available to measure ambient light as well, but we only did this for the most serious crashes.
- Survey the area for abandon, unregistered or improperly parked vehicles as well as any trash or debris that may create a hazard or obstructed view.
- Finally, the municipality could consider investing in a Traffic Data Recorder which measures volume and speed. We regularly deployed them, and they capture the average speed of all traffic on the roadway to help determine what actions a Police Department and municipality should consider, such as speed enforcement, engineering changes, speed limit modifications and signage. The devices are fairly inexpensive at about $2,000.



CHAPTER 15

LOCAL OFFICIALS ETHICS ACT

William Kearns, former Mayor of Willingboro and long-time Fund Attorney for the PMM and BURLCO JIFs, contributed much of this chapter. We would also like to thank the Local Finance Board of the N.J. Department of Community Affairs staff for all of their assistance in researching case studies.

Webster's defines ethics as "The discipline dealing with what is good and bad and with moral duty and obligation." In government, there is the smell or gut test, meaning that if it feels wrong, it probably is. If you think something may be a conflict and do not have time to secure a legal opinion, it is best to recuse yourself from the matter.

Both the Federal and State Governments have enacted criminal laws covering bribery and official misconduct. New Jersey has also enacted the Local Government Ethics Act that goes beyond the criminal statutes to cover conflicts of interest. When it enacted the Local Government Ethics Act, the Legislature declared that:

> "Governments have the duty both to provide their citizens with standards by which they may determine whether public duties are being faithfully performed and to apprise their officers and employees of the behavior which is expected of them while conducting their public duties." [276]

While rare, officials have been sent to jail for ethical lapses. For example:

- While running for re-election, a Mayor offered his opponent a governmental job if he would drop out and was sentenced to five years. [277]
- Another Mayor, who was also a powerful State Senator, used his official position to push the DEP to grant an approval for a law client. He was sentenced to three years. [278]
- A Mayor, who was also a foreman of a utility authority, assigned authority employees to work at his supervisor's house. The Mayor was sentenced to three years and the supervisor was sentenced to five years.

Even if not prosecuted, ethical lapses can end an official's career. In one case, a Mayor who was in the business of selling uniforms stated on numerous occasions that he was the Police Department's best friend and "had their backs." Despite this obvious bias, he did not recuse himself from union negotiations. The retired Superior Court Judge, who the town had retained to investigate this matter, ruled that the relationship was too cozy, and the Mayor did not have sufficient objectivity because of this outside business. As a result, the Mayor resigned. [279]

Provisions of the Act

Applicability

The Act covers anyone who is elected, employed or appointed. The Act specifically pertains to "local government officers or employees, under the jurisdiction of the Local Finance Board…." [280]

Prohibitions

The Act provides that:

> "No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction or professional activity which is in substantial conflict with the proper discharge of his duties in the public interest." [281]

Note that this basic prohibition pertains to both the public official and the official's immediate family which is defined as:

> "The spouse or dependent child of a local government officer or employee residing in the same household." [282]

The Act also prohibits both "direct" and" indirect conflicts." [283] A "direct conflict" involves your own personal interests, while the concept of "indirect conflicts" is broader. In various cases, the courts applied this restriction to the interests of family members, non-economic personal advantage and future gain.

Other Employment

Governmental officers and employees are prohibited from other employment that is in conflict with official positions. For example, an elected official cannot also be an employee of the town.

Specifically:

> "No local government officer or employee shall undertake any or service whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties." [284]

Exceptions:

- This provision does not bar nepotism. [285]
- The law allows volunteer firefighters to serve as local elected officials even though they are technically employees. This exception is limited to volunteers.
- Board of Education employees are also permitted to serve on municipal councils. [286]

Gifts, Meals and Other Entertainment

Public officials and employees may not accept gifts, meals or other entertainment if there is any inference that someone is attempting to influence their decisions. If you find yourself at a bar or restaurant, pay your portion of the tab and get a receipt.

The restriction against accepting things of value does not apply to political contributions "if the local governmental officer has no knowledge or reason to believe that the contribution, if accepted, was given with the intent to influence the local government officer in the discharge of his official duties." [287]

Using Information Learned During Official Duties

Under the Act, it is only legal for public officials to use information or governmental services that are generally available to members of the public. [288] In other words, you cannot use information that you learn in executive session or in caucus in your private affairs.

Representing Parties Before Boards and Agencies

The Act prohibits officials and employees from representing other parties before any of the local unit's boards or agencies. This prohibition also applies to anyone, including engineers, architects, auditors and planners. However, the law specifically permits employees to represent other employees involved in union activities. [289]

Other Exceptions to the Act

> "No local government officer shall be deemed in conflict with these provisions if no gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group." [290]

This provision recognizes that there is a potential conflict in every action, and if taken to an extreme, this Act would make it impossible to conduct business. For example, every Council member pays local taxes, either directly or indirectly. Therefore, one could argue that every Council Member has a personal interest when adopting the budget.

The Legislature also recognized that the Act could be interpreted to prohibit public officials from taking up a cause for specific constituents and added the following exception:

> "No elected local government officer shall be prohibited from making an inquiry for information on behalf of a constituent if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family, whether directly or indirectly, in return therefore." [291]

The word "if" in this statement is important. As discussed earlier, a very powerful elected official went to jail for ignoring it.

Cure for a Conflict of Interest

Normally, the cure to a conflict of interest is to disclose it and not take part in the decision. After recusal, officials and employees can represent themselves or their family in matters before your public entity. For example, in one case, a Zoning Board Member who recused himself because he lived within 200 feet of the subject property was permitted to appear before the Zoning Board from the audience to object to the variance.[292] Be very careful and talk to your local government's attorney with the authority to review ethical issues.

Hobbs Act (Extortion)

This Federal Act, passed in 1946, was meant to prohibit certain strong-arm labor activities. It was not until the 1970s that the Hobbs Act was regularly used against corrupt state and local officials[293] and became the statute of choice for prosecutors investigating governmental corruption.

Under the Act, "extortion" means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under the color of official right." In other words, "bribery" is a federal crime under the Hobbs Act because it is considered extortion.

- The offense of extortion "under the color of official right" does not have to involve force or threat on the part of the public official. The coercive element is provided by the existence of the public office itself.
- The law also outlaws indirect payments or other tangle benefits to family, friends or campaigns.
- The government does not need to prove that the public official or employee actually misused or even attempted to misuse the office. Although the other party may not have received anything more than their due, the official's acceptance of money or a benefit in return for the use or attempted use of official power is enough to establish criminal extortion.

Other Cautions

- Don't use governmental equipment or vehicles for personal business, including volunteer activities or political campaigns.
- Don't request that governmental employees work on your property, personal business or campaigns.
- Don't use governmental information that is not commonly known for personal gain. A good test is to avoid using any information that is not available through OPRA.
- Don't meet alone with developers or others seeking advantages from you. It is best to meet in the local government's office or the office of the government's attorney, and not in restaurants or your personal business office. Record the meeting and immediately break-off the discussion if anything improper is suggested. Avoid the temptation to be polite. Assume that whatever you say may be read to a jury.

Selected Case Law:

Hollander v. Watson (1979) [294]

Facts: A Freeholder was appointed by the Board of Freeholders to the county college's unpaid Board.

Decision: The Court ruled that the Freeholder could not serve on the college Board under the doctrine of incompatibility. You cannot serve in a dual capacity where you must supervise yourself by serving on the Board of a subordinate agency. As Michael Pane, a noted expert on conflicts of interest, wrote:

> "Offices are incompatible when there is a conflict or inconsistency in their functions. Therefore, offices are not compatible when one is subordinate to or subject to supervision or control of the other or the duties of the offices clash requiring the officer to prefer one obligation over the other."

Comment: A statute provides an exception in some cases. For example, there is no problem with you representing your Agency on the Board of a Joint Insurance Fund because that is permitted by the statute that created JIFs. There is no problem with the volunteer Chief of a Fire Company serving on the municipal council because that is also permitted by statute. Be very careful to recuse yourself whenever a matter impacts both entities. Conversely, the statute does not permit a volunteer Chief in an Independent Fire District to serve as a member of that Fire District's Governing Body. [295] Seek an attorney's guidance before proceeding in these cases, as they are very technical.

Evans v. United States (1992) [296]

Facts: An FBI Agent, posing as a real estate developer, called an elected County Commissioner and offered a campaign contribution in return for assistance in an effort to rezone a 25-acre tract for high-density residential use. The Commissioner accepted a cash contribution of $7,000 and a check to the campaign of $1,000.

Decision: The U.S. Supreme Court ruled that "If a public official demands or accepts money in exchange for specific exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution."

Comment: Under the Hobbs Act, the official does not need to instigate the transaction, and payments to other parties or campaign contributions still constitute a felony.

Local Finance Board Opinion 92-011 (1992)

Facts: A Council Member who was in the dry-cleaning business asked the Local Finance Board if he could submit a bid to the town so long as he recused himself from establishing the specifications or considering the award.

Decision: The Board ruled against the Council Member. Even though the service is being awarded by bid and the member recused from anything concerning the award, the other members of the governing body may still be influenced to give their colleague special consideration.

Comment: These situations are very fact sensitive. Let's say you work for an auto company. It would not be a problem for the local dealer to submit a bid for police cars so long as you recuse yourself. However, it would be a conflict if you worked for that dealer. This example further demonstrates the importance of talking with your public entity's attorney before deciding whether to participate in a matter.

Local Finance Board Opinion 92-015 (1992)

Facts: A Council Member worked for an auto supply company that had a contract through the State Cooperative Purchasing System. The member inquired if it was permissible for his municipality to purchase auto parts from his firm.

Decision: The Board ruled that this would violate the Ethics Act. The State Cooperative Purchasing System often includes multiple vendors for a given item. Therefore, the town is still showing favoritism by selecting one firm over another, or by deciding to use the State Cooperative Purchasing System instead of issuing a separate bid.

Wyzykowski v. Rizas (1993) [297]

Facts: The Mayor submitted an application to the Planning Board to develop his own property and recused himself from the deliberations.

Decision: The New Jersey Supreme Court decided that this was legal but cautioned that the Mayor must be very careful not to exert any influence on the case. Being an elected official does not mean that you must give up your right to develop property.

Local Finance Board Opinion 95-001 (1995)

Facts: A Council Member, who was also an employee of the Board of Education, voted on the revised school budget after it was defeated.

Decision: The Board ruled that the vote was legal. The Legislature specifically decided that Board of Education Employees can serve on Municipal Councils and can participate in all decisions unless there is something in the budget that specially applies to that individual.

United States v. Bradley (1999) [298]

Facts: The Mayor's Chief of Staff, who was also a member of the New Jersey State Assembly, assisted an independent insurance "consultant" to obtain insurance contracts for a large national broker. The consultant was paid part of the commissions by the national broker but did little real work. The consultant then shared the fee with the Assembly Member.

Decision: The Federal Appeals Court upheld the jury verdict and jail sentences against both the Assembly Member and the consultant.

Comment: Undisclosed commission sharing arrangements in insurance contracts were common at one time and have resulted in a number of criminal convictions.

Shapiro v. Mertz (2004) [299]

Facts: A Planning Board Member with many years of experience was confirmed for reappointment by one vote. The tie-breaker was his recently elected wife, who argued that her vote was not a conflict because the Planning Board is an unpaid position.

Decision: The Court ruled that the spouse's vote was clearly a violation of the Local Official's Ethics Act. The issue of compensation is not relevant. Even though unpaid, a Council Member may not vote on the appointment of a family member.

Horvath v. Local Finance Board (2004) [300]

Facts: A Mayor appointed his daughter to a Planning Board position that did not require Council confirmation. He also nominated his brother-in-law to be the Municipal Attorney.

Decision: The Office of Administrative Law decided that if the Legislature wanted to outlaw nepotism, it could have adopted a specific prohibition to that effect.

Comment: The difference between the Horvath and Shapiro decisions is that in Horvath, his daughter could not serve on the Planning Board without her father's appointment. In the Shapiro case, however, the husband could remain on the Board without his wife's vote if enough other Council Members voted to confirm the appointment.

Beacon Hill Farm v. Marlboro (2006) [301]

Facts: While considering a Zoning Code amendment, the Council President recused himself but continued to sit at the dais and perform his functions, including directing debate, controlling the meeting and calling on interested parties.

Decision: The Council President's actions were unethical. If you recuse yourself, you must leave the table, and if the matter is being discussed in Closed Session, you must leave the room. Under some circumstances, you must also leave the room even if the Board is in Public Session because your presence may influence the other Board Members. Further, once you recuse yourself, you must not have involvement with any aspect of the matter during its entire life cycle.

Hughes v. Monmouth University (2007) [302]

Facts: Several Zoning Board Members voted to approve a controversial college library expansion even though they were alumni.

Decision: The Court ruled that there was not enough of a connection to create a conflict.

Comment: Contrast this decision with another case where the Court determined that members of the Planning Board could not sit in on an application from a marina because they belonged to a neighboring boat club that opposed the marina. Ethics matters are very fact sensitive.

New Jersey Superior Court Appellate Decision Re: Zisa (2008) [303]

Facts: A town purchased land for a parking lot. The Mayor then entered into an agreement to lease some of the spaces for his business. Subsequently, the town advertised bids to pave the parking lot and awarded the bid. Before voting the Mayor was advised by the municipal attorney that his vote on the award was not a conflict of interest even though his business would be using many of the spaces. A complaint was made to the Local Finance Board, which fined the Mayor $200 after deciding that the Mayor's actions were clearly over the line. The Mayor then appealed.

Decision: The Appellate Court ruled that absent any indication of collusion, the fact that the Mayor requested and received the advice of the municipal attorney qualified the Mayor for the "Safe Harbor" defense.

United States v. Donna (2010) [304]

Facts: The Mayor and his wife, who also served on the Planning Board, became close to two sisters who owned several bars in town. After the sisters experienced difficulties with one of their liquor licenses, they intentionally befriended the Mayor's wife. Over the next few years, gifts were exchanged, including some from the sisters to the Mayor's wife that were quite expensive. When the sisters filed an application to the Planning Board, the Mayor interceded with the building inspector and other officials. Neither the Mayor nor his wife recused themselves when the Planning Board heard the application.

Decision: The Mayor and his wife were convicted of extortion, and the Mayor served four years in federal prison. The Court ruled that the government did not have to prove a direct connection between the "gifts" and the official acts. The mere fact that there had been a "stream of benefits" over time is sufficient to establish a criminal violation of the Hobbs Act.

Comment: The fact that someone is a "friend" does not necessarily create a problem. However, if the relationship involves extensive gift-giving or other favors, it is best to recuse yourself from any matter involving the friend.

Local Finance Board Opinion 11-073 (2011)

Facts: A member of the Municipal Council was also employed as the town's Planning Board Secretary.

Decision: As an elected official, you may not be an employee of the municipality or an authority controlled by that municipality. The only exception is a volunteer first responder who is technically considered an employee.

Comment: This prohibition does not extend to family members. As indicated in the Horvath decision, if the Legislature intended to outlaw nepotism, it would have done so. However, you must be very careful about voting or participating in anything that impacts your family member. This is another example of where you should talk to your organization's attorney with the responsibility for ethical matters.

Local Finance Board Opinion 11-146 (2011)

Facts: The town was having a referendum on combining the Planning and Zoning Boards. The Mayor urged residents to vote for the measure in the town newsletter which was paid for by the town.

Decision: There is nothing wrong, per se, with the Mayor using the town newsletter to explain the referendum. However, once the Mayor uses statements such as "I urge you to support this proposal," or "vote yes in the referendum," that crossed the line into campaigning. It is illegal to use public resources in campaigns.

Local Finance Board Opinion 12-030 (2012)

Facts: The Mayor participated in a decision to award a consulting contract to the university from which he graduated and remained a very active alumnus and supporter.

Decision: There is no conflict because the Mayor does not have an "interest" in the university. The law defines "interest" as "the ownership of more than 10% of the profits or stock of a business organization but shall not include the control of assets in a non-profit entity or labor union."

Local Finance Board Opinion 12-037 (2012)

Facts: The Mayor used the title "Mayor" in solicitations for a charity, and in letters sent at his expense, requested contributions to individuals and firms that did work for the town. He did not use official stationery.

Decision: It is legal to use your title and solicit donations from individuals and firms that do work for the town so long as there is no implication of a "quid pro quo."

Comment: You can also use your title when soliciting campaign contributions. You cannot, however, use official letterhead or public resources when soliciting contributions for either charities or campaigns.

Local Finance Board Opinion 12-093 (2012)

Facts: The Mayor's agency provided insurance to a lawn service that worked for the town for many years. The service only started purchasing insurance from the Mayor after the Mayor was elected.

Decision: The Board ruled in favor of the Mayor. The fact that the contractor did work for the town before the Mayor was elected suggests that there was no favoritism in the award. The Board's decision was also influenced by the fact that the contractor's policies represented only a small portion of the Mayor's commissions.

Local Finance Board Opinion 13-009 (2013)

Facts: A Council Member often inquired about the status of approvals on behalf of construction companies that had business with him and gave him political contributions. He was asked by the town Business Administrator to stop interfering but ignored the request.

Decision: The Board ruled in favor of the Council Member. This was a very nasty situation that became personal, to the extent that the Council Member also threatened to eliminate the Administrator's position. Under the Act, however, a Council Member may inquire about matters involving constituents, including business associates and contributors, so long as the Council Member is not paid to represent anyone and does not exert undue influence. That is a very tricky call.

Comment: The facts in this case come close to a Hobbs Act violation. There is a very fine line between making an "inquiry" and "interceding."

Local Finance Board Opinion 12-013 (2013)

Facts: The Council President used one sheet of official town stationery to endorse a candidate for Congress. The letter was reproduced at the expense of the campaign and had the proper "paid for" statement at the bottom.

Decision: You may not use even the image of official stationery for anything other than official government business.

Comment: You cannot use anything funded by the taxpayers in your campaigns - one sheet or a ream of paper doesn't matter. While one sheet of paper seems like a small matter, your opponents will have a field day in the press at your expense, and you are exposing yourself to a fine if anyone complains to the Local Finance Board. What constitutes illegal use of public resources is very broadly interpreted.

Local Finance Board Opinion 14-008 (2014)

Facts: A Council Member voted to appoint his Campaign Manager to a vacant position on the town's Utility Board.

Decision: This appointment was legal. Simply because someone was involved in your campaign does not bar you from appointing or confirming them in any paid or unpaid municipal position.

Comment: If this were a conflict, at least half of the people appointed in municipal government would be disqualified.

Local Finance Board Opinion 13-014 (2015)

Facts: A Council Member voted on a matter involving the non-profit Police Athletic League (PAL) that oversaw some of the town's athletic events. While the Council Member was also the PAL President, there was no hint of personal gain, and the athletic teams were open to all members of the public.

Decision: This was not legal due to the Council Member's position as the President of the League.

Comment: This would be legal if the Council Member were not an officer of the non-profit. This is another example of why you should seek the advice of your local government's attorney before participating in discussions concerning any organization you are connected with.

Local Finance Board Opinion 11-088 (2015)

Facts: The Deputy Mayor testified before the Landmark and Historic Preservation Committee on behalf of the administration in support of an applicant seeking permission to install a sign in the historic district. The Deputy Mayor had no personal interest in the application and the decisions of the Committee could not be appealed to the municipal Governing Body.

Decision: The testimony was legal. The key caveats are that the Deputy Mayor had no personal interest in the application, and the decisions of Landmark Committee could not be appealed to the Governing Body.

Grabowsky v Montclair (2015) [305]

Facts: During the hearing for an application to build a senior citizen home, the Mayor created a storm when he said that this might be a good place for his mother to live.

Decision: The New Jersey Supreme Court ruled that the Mayor did not have a conflict merely because his mother *might* move into the proposed senior center. However, the Mayor was also a Board Member of a church adjacent to the proposed senior center. The Mayor's vote was, therefore, a conflict because of his relationship with the church.

Conclusion

It is critical to remember that under some circumstances, local officials are eligible for a "Safe Harbor" defense when acting under the advice of an attorney, as long as the attorney is not in collusion with you.[306] To be eligible for this "Safe Harbor" defense:

- The advice must be received prior to your action.
- The individual who offered the advice possessed authority or responsibility with regard to ethical issues. Relying on your personal attorney or a friend is not sufficient.
- The individual seeking advice made full disclosure of all pertinent facts and circumstances.
- The individual complied with the advice, including all the restrictions.

In addition to consulting your local government's attorney, you may also request a confidential Advisory Opinion from the Local Finance Board. The request must come from the individual contemplating the future act, or that individual's specifically authorized representative, and the action must be prospective. The Board cannot issue an opinion on an action that has already occurred.

[276] *N.J.S.A. 40A:9-22.2d*
[277] State v. Lake (2009)
[278] N.Y. Times, "Ex-Leader of New Jersey Senate is Guilty of Corruption." September 16, 2006
[279] Unreported decision
[280] *N.J.S.A. 40A:9-22.5*
[281] *N.J.S.A. 40A:9-22.5a*
[282] *N.J.S.A. 40A:9-22.3i*
[283] *N.J.S.A. 40A:9-22.5d*
[284] *N.J.S.A. 40A:9-22.5e*
[285] Horvath v. Local Finance Board OAL DKT. NO. CFB 1506-04 (2004)
[286] Allen v. Toms River Regional BOE 233 N.J. Super. 642 (1989)
[287] *N.J.S.A. 40A:9-22.5f*
[288] *N.J.S.A. 40A:9-22.5g*
[289] *N.J.S.A. 40A:9-22.5h*
[290] *N.J.S.A. 40A:9-22.5i*
[291] *N.J.S.A. 40A:9-22.5j*
[292] Murtagh v. Park Ridge Not Reported in A.2d (2006)
[293] Fleissner, James, Prosecuting Public Officials Under the Hobbs Act, 1985
[294] 167 N.J. Super. 588 (1979)
[295] Local Finance Opinions 92-004 & 93-019 (2005)
[296] 504 U.S. 255, 265 (1992)
[297] 132 N.J. 509 (1993)
[298] 173 F.3d 225 (3d Cir. 1999)
[299] 368 N.J. Super. 46 (2004)
[300] OAL DKT. NO. CFB 1506-04 (2004)
[301] Not Reported in A.2d (2006)
[302] 394 N.J. Super. 193 (2007)
[303] A-3219-04T5 (2006)
[304] 366 F. App'x 441 (3d Cir. 2010)
[305] 221 N.J. 536 (2015)
[306] Re: Zisa A-3219-04T5 (2006)

CHAPTER 16

OPEN PUBLIC MEETINGS ACT

The first law that opened local meetings in New Jersey was adopted in 1960 and was widely criticized because it only focused on meetings where official action was taken. There was bi-partisan support to further open government to the public during the early 1970s. In his report, "New Jersey's Right to Know: A report on Open Government (1974)," Attorney General George Kugler argued that decisions are really made in so-called "workshop meetings." To correct this problem, Assemblyman Byron Beer introduced today's Open Public Meetings Act (OPMA) [307], which was signed into law by Governor Brendon Byrne in 1975. Governor Byrne wrote, "Public bodies exist for the public's convenience, not their own."

Basic Provisions:

What Constitutes a Public Body?

A "Public Body" is an organization created under New Jersey law that performs governmental functions or spends public funds, not including the judicial branch, a jury, a parole board, the State Commission of Investigation, the Apportionment Commission or any regular political party." [308]

Comment: A meeting between newly elected officials who have not yet taken office may be considered as a de facto public body if they discuss their plans for future public action. While these meetings may qualify as a partisan "caucus," this exception does not apply to non-partisan public bodies, even if voting members belong to a political party.

What constitutes a meeting?

A "meeting" is any gathering of the quorum of any "voting body" held with the intent to discuss or act upon the business of the "public body."[309]

Comments:

The following are not considered to be meetings:

- Gatherings of three or more similar organizations.
- Ad hoc groups consisting of several members of various public bodies without any power to vote.
- Meetings between a public official and subordinates who are not empowered to vote.
- Informal polling of members by the attorney or manager, so long as there is no discussion or action as a unit.
- Meetings or gatherings where discussion on public business will not take place, such as a Fire Department awards dinner. It is not legal for members of a governing body or a board to go out for a "cup of coffee" after a meeting and continue the discussion of public business.

Notice

All meetings must be advertised, and notices posted, except for meetings that are strictly limited to issues that qualify for "closed session"[310] or an emergency meeting.[311] The notice must conform to the statute.

Comments:

- A meeting does not need to be in-person to require notice. Public bodies are now frequently using electronic communications to conduct business, and these electronic "meetings" must still meet all the notice requirements of a regular meeting.
- While notice must be given to the official newspapers more than 48 hours before a meeting, the public entity can still proceed even if the newspaper failed to publish the notice.
- The notice only requires a list of items to be discussed and does not require copies of the supportive materials usually provided to the members.
- Once the Public Body gives notice with its agenda, no further notice is required if the agenda is changed, so long as the original agenda included all business known at the time, and the public body did not act to mislead the public.
- An emergency meeting should only be held for compelling circumstances, such as health and safety. In one case, a Court held that taking action that would save $570,000 was not adequate rationale for an emergency meeting.
- If a meeting is recessed or adjourned to another date, the Public Body must comply with the notice requirements for the new meeting.

Permitted Matters for Closed Sessions

Under the Act, all meetings must begin in "open session." After reading the appropriate notice, the meeting may only be "closed" to discuss certain matters that are specified under the statute:

> "(1) Matters which are confidential by express provision of federal law, State statute, or rule of court;
>
> (2) Matters which if released to the public would impair the receipt of funds from the US Government;
>
> (3) Material that if disclosed would constitute an unwarranted invasion of individual privacy; [312]
>
> (4) Collective bargaining agreements, including the negotiations with bargaining units;
>
> (5) The purchase, lease, or acquisition of real property, or investment of public funds, if public discussion could adversely affect the public interest;
>
> (6) Tactics and techniques utilized in protecting the safety and public property of the public if disclosure could impair that protection, or investigations of violations of the law;
>
> (7) Pending or anticipated litigation or contract negotiation or matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer;
>
> (8) Matters involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting;
>
> (9) Deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility." [313]

Comments:

- The resolution to enter "closed session" can be verbal but must include enough detail to justify "closing" the meeting. It is not sufficient to merely say, "to discuss any matter exempted by OPMA," or, "to discuss matters falling within attorney-client privilege."
- While a Public Body is permitted to discuss public business in "closed session," it may not act. Votes must take place in public. There is no requirement to explain the reasons for the action as this would circumvent the purpose of discussing the matter in closed session.
- The "public safety" exception is meant to cover situations where life or property could be jeopardized if information is released. It does not cover policy discussions, such as whether a municipality should appoint a Director of Public Safety instead of a Police Chief.

- If the pending or anticipated litigation against the public body was filed by a member of the public body, that member may be excluded from any session where the matter is discussed (See Chapter 14).
- The New Jersey Supreme Court clarified the notice requirement to adversely impacted employees in Rice v. Union County BOE,[314] included in this chapter's Selected Case Law.

Minutes

"Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public…." [315]

Comments:

- Minutes must be taken at all times. The minutes of closed sessions should be redacted as needed but must be released if requested.
- "Reasonably comprehensible" means that the minutes must include what took place and the final action, not a verbatim record.
- There is no hard and fast rule of what constitutes "promptly available." Generally, the Courts have held that minutes should be completed and approved at the following meeting. However, this becomes a problem for entities that meet infrequently. For example, in 2018, the New Jersey Supreme Court found that five months was unreasonable but overruled an Appellate Court's requirement that minutes be available in 45 days. [316]

Public Participation

"…..a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal governing body or board of education, the length of the portion to be determined by the municipal governing body or board of education, for public comment on any governmental or school district issue that a member of the public feels may be of concern to the residents of the municipality or school district." [317]

Comments:

This requirement is limited to Boards of Education and municipal governing bodies. The New Jersey Supreme Court declined to extend this provision to the Rutgers Board of Governors. [318]

Decorum

There is a general sense that politics have become especially nasty in recent years, but politics has always been rough and tumble. For example, the distance between the front benches in the House of Commons is two sword lengths plus one foot. Early Sergeants at Arms maintained order with the mace that was kept in front of the Presiding Officer for everyone to see.

The problem is that the lack of civility discourages people from becoming involved in government. The lack of decorum also leads to lawsuits and, under some circumstances, personal liability. Discord also makes it more difficult to manage any government effectively.

In Al Falah Center v. Township of Bridgewater [319] discussed in Chapter 6, the town was ordered to pay $2.5 million to purchase another property for the mosque, and the Township's insurer paid the mosque's $5 million legal bill. An important factor in the Federal Court's decision was the fact that the public hearing was especially ugly, and how quickly the Council then moved to change the zone after the application was filed. The Court wrote that "Bare animus towards a group or fear, unsubstantiated by factors which are properly cognizable in zoning proceedings may constitute sufficient evidence for a zoning ordinance to fail under an equal protection challenge." In a situation like this, the public needs to understand that if the meeting starts to focus on things that are discriminatory, the decision could be made by the Courts and not by the town.

The United States Supreme Court has created a series of rules based on the nature of the forum. At one extreme are "traditional public forums," such as street corners or parks, where the right to speak and protest is broadly protected. At the other extreme are "nonpublic forums," such as military bases, where government can exercise broad control over speech. Local government meetings are "limited public forms" that fall somewhere in between. The Supreme Court recognizes that government has business to conduct.

The U.S. Court of Appeals upheld an ordinance in 1989 in White v. Norwalk, California [320] that provided:

> "Each person who addresses the Council shall not make personal, impertinent, slanderous or profane remarks…. Any person who makes such remarks, or who utters loud, threatening, personal or abusive language, or engages in any other disorderly conduct which disturbs or otherwise impedes the orderly conduct of any council meeting shall, at the discretion of the presiding officer or a majority of the Council, be barred from further audience before the Council during that meeting."

The Court also held that:

> "In dealing with agenda items, the Council does not violate the first amendment when it restricts speakers to the subject at hand…. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint the speaker is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious."

The key to understanding the White decision is that local government cannot regulate speech, per se, but, under some circumstances, it can regulate conduct that impedes the process of government.

In 2010, the New Jersey Supreme Court applied this principle in Besler v. BOE of West Windsor-Plainsboro: [321]

> "A public body may control its proceedings in a content-neutral manner by stopping a speaker who is disruptive or who fails to keep to the subject matter on the agenda. The government or a school board, however, has the burden of showing that its restriction of speech in a public forum was done in a constitutionally permissible purpose."

In this case, a parent complained that a coach used profanity with a girls' basketball team. When the parent didn't receive what he considered to be a satisfactory response, he filed a lawsuit. For eight consecutive meetings, he spoke about the case and criticized the coach personally. Finally, the Board President read a statement that speakers should not attack individuals, talk about pending litigation or otherwise repeat themselves. A few minutes later, when the parent was recognized, he again returned to the same argument and was cut off by the President. He sued, and a jury agreed with the speaker and awarded damages. The Board appealed.

The New Jersey Supreme Court ruled that this was a jury question and that the burden of proof was on the Board to show that its actions were reasonable. The Court held that because the Board established its decorum rules just before this speaker was to be recognized, a reasonable juror could conclude that the Board was singling out this particular speaker. The fact that New Jersey places the burden of proof on local government makes it more difficult to deal with decorum issues, but not impossible.

Maintaining Decorum

- The most critical thing a Mayor, School Board President or other Presiding Officer must do is establish protocols at the reorganization meeting and consistently enforce them. In the 1970s and 80s, it was sufficient to use "Robert's Rules of Order." Today, you should adopt a resolution or ordinance with some basic guidelines on decorum. A model is available in the Resources Section.
- Consistent enforcement is critical. You cannot call your opponents out of order for things that your supporters are allowed to get away with.
- Establish reasonable time-limits for speakers both at hearings and the "open" portion of the meeting.
- Establish a meeting curfew so that the meeting automatically ends at a certain hour unless the bylaws are suspended, which requires a two-thirds vote. Both Council Members and the public become more succinct when they know that the meeting will end at a specific time.
- Avoid getting into a debate with the public. The meeting will quickly get out of hand if the Presiding Officer gets into an argument from the dais. You are not obligated to answer or respond to any questions. Defer questions that require follow-up to the Manager, Attorney or Committee Chairs, and, depending on the circumstances, you can offer to answer questions after the meeting.
- Be careful of your body language when you are presiding. It is best to maintain eye contact with the speaker and avoid comments or expressions that appear to be judgmental. Try to appear as neutral as possible. One expression that may help calm a discussion is, "This is a situation where reasonable people can come to different conclusions with the same facts." You can also remind everyone that whatever they say will be permanently on the record and cannot be redacted.
- Do not attempt to shout down a speaker, which only escalates the situation. Call for a short recess when things are getting out of hand. This motion is privileged and proceeds without debate. Cooler heads will often prevail, and you can regain control without having to take more formal action. You should always call a recess before asking the police to talk to someone who violates the decorum rules.

Defamation

Local officials must also be knowledgeable about what constitutes defamation. Webster's defines defamation as:

> "The act of communicating false statements about a person that injure the reputation of that person."

Despite all of the nasty things that citizens say about politicians, or that politicians say about each other, you rarely hear about defamation lawsuits. It is far more difficult for a public official to prevail in a defamation case than a member of the general public.

In 1964, the Supreme Court ruled in New York Times v. Sullivan [322] that a public official who alleges defamation must also prove actual malice in order to recover damages. In other words, you must show that the person you are suing knew the statement was false or was guilty of reckless disregard of the truth, which is a very tough standard. Political figures must be very careful before filing defamation lawsuits, as you will probably lose and may be countersued.

As the Supreme Court ruled in Sullivan:

> "Our Free Society must give breathing room for an uninhabited and robust discussion of public issues, even when it includes vehement, caustic and sometimes unpleasantly sharp attacks in government and public officials."

Right to Record and Film

Under Federal and New Jersey law, [323] private citizens also have some First Amendment rights to record public officials and employees performing their duties. This includes the right to enter public areas of public and semi-public buildings or property to record government employees performing their duties. This right is not absolute and is subject to reasonable time, place and manner restrictions.

The right to film or record exists when:

- Recording public officials or employees at traditional public forums, such as parks and public streets and in limited public forums, such as at public meeting rooms.
- Recording public officials and employees while they are in areas of public buildings and public spaces that are open to the public.
- Recording public officials and public employees while they are in areas not open to public access, so long as the person recording or the recording equipment itself does not trespass into closed areas.
- Recording law enforcement activities outside of closed areas, such as officers during the course of performing an arrest, traffic stop or truck inspection.
- Recording hazardous or dangerous property conditions.

Limitations: The right to record and film is subject to reasonable time, place, and manner restrictions. [324] The restrictions must be "(i) justified as reasonable time, place, and manner restrictions without reference to the content of the speech; (ii) narrowly tailored to serve a significant government interest; and (iii) must leave open ample alternative channels for communication of the information."

The right to film or record has been found not to exist:

- While filming areas not generally open to the public that poses legitimate safety and security risks such as jails, holding cells or bathrooms.
- When the recorder interferes with the official's performance of their duties in, or interferes with, an investigation.
- Recording a police conversation with a confidential informant.
- Violating an ordinance prohibiting or restricting photography of private citizens for commercial resale without a permit. [325]

First Amendment Audits: A social movement has emerged where activists record governmental facilities or employees to test their compliance with First Amendment rights. For example, representatives will show up at government facilities, video the parking lot, check for signs to determine if they can enter protected areas and enter the public area while recording the operations at the facility. They will question employees, asking for their name and position. They may ask about accessing official government records and the process that must be followed. When public employees ask questions, the "First Amendment Auditors" often refuse to answer. The attitude and demeanor of the Auditors can be unnerving, and on occasion, they may use foul and abusive language. Many of the videos are posted online. They may also audio dub the recordings with comments that demean or criticize the public employees.

Litigation Risk Committee

Each local government should adopt a written policy to address the right to record governmental facilities and field activities. A model policy is available in the Resources Section. The Committee should also arrange for a periodic site review of each facility to determine security vulnerabilities.

The policy should provide that:

> "The (type of local unit) recognizes that citizens have a First Amendment right of access to certain government information. This includes a citizen's right to enter and access areas of public property that are open to the public for the purpose of recording public officials and employees performing their job functions within these areas open to the public. However, this right is not absolute and unqualified, and may be limited by certain reasonable time, place and manner restrictions."

The first priority is the protection of employees. Personnel must be instructed to refrain from engaging in any physical contact or verbal confrontation with the Auditor. If the Auditor engages in physical contact or threats of physical violence, the employee should immediately contact law enforcement. Anyone who engages in threats of physical violence or a significant pattern of harassment may be removed from government property by police and charged with a "defiant trespass" disorderly persons' offense. [326]

The Litigation Risk Committee should work with the Safety Committee to review institutional security, signage and other safeguards. Where necessary, implement security sign-in, video surveillance, fencing, additional locks and a system of government identification scan cards.

Selected Case Law:

Rice v. Union County BOE (1977) [327]

Facts: When the budget was defeated by the voters, the Board determined that it must eliminate 17 positions. After a "closed session," the Board went back into "open" and adopted a resolution with the specific names to be terminated. One teacher requested a prerogative writ overturning the action on the grounds that the teachers were not given advanced notice that they could request the discussion take place in "open session."

Decision: The New Jersey Supreme Court ruled that public entities must notice employees whenever the Public Body will discuss a matter that negatively impacts them in "closed session." This is referred to as a "Rice Notice." If all impacted employees elect, the matter must then be discussed in "open session." The impacted employees do not have a right to attend the "closed session."

Kindt v. Santa Monica (1995) [328]

Facts: An apartment owner was ejected from the Rent Control Board on a number of occasions for trying to speak at various times throughout the meeting. He argued that limiting comment to the end of the meeting meant that he could not share his views when the resolutions were actually being decided. He was also a true gadfly who often heckled the Board and other speakers.

Decision: The Court ruled that "The Board regulations restricting public commentary to three minutes per item at the end of each meeting are the kind of reasonable time, place and manner restrictions that preserve a board's legitimate interest in conducting efficient and orderly meetings."

Newman v. Delahunity (1996) [329]

Facts: A candidate for Mayor created a newspaper to attack the incumbent Mayor. In this paper, he would take one or two "facts" and contend that these "facts" proved corruption. For example, in one story, he falsely wrote that the Mayor was using tax dollars for his home in Florida. The Mayor sued the would-be newspaper tycoon for defamation. Thinking the case frivolous, the defendant represented himself.

Decision: A jury awarded the now ex-Mayor punitive damages of $200,000, and the Appeals Court upheld the award.

Comment: This case was highly unusual because the defendant acted as his own lawyer. The consensus is that the case would probably have been thrown out if the defendant had been properly represented.

State v. Charzewski (2002) [330]

Facts: A citizen was told on numerous occasions to stop interjecting into the regular Council discussion. The speaker continued and was escorted out of the room without resistance. He was later charged with being a disorderly person. He then sued for malicious prosecution.

Decision: The New Jersey Appellate Court ruled that merely being disorderly at a council meeting was not a criminal offense, per se. The Court wrote that the speaker's "conduct may have been rude and excessive, but it was not criminal."

Comment: Not every interruption constitutes a criminal disruption.

Donato and Calogero v. Moldow (2005) [331]

Facts: Two members of the governing body sued the operator of an online community bulletin board who refused to remove clearly defamatory postings from unidentified writers. There was no question that the postings were defamatory even under the tough Sullivan standard. If the bulletin board were a newspaper, an editor would be liable for printing defamatory letters from unidentified writers.

Under Federal law, website operators are not considered editors and have immunity. In this case, the webmaster also exercised editorial control by deciding which postings to remove from the site. For example, he quickly removed anything critical of himself, and also admitted during a deposition that he had a personal grudge against one of the Council Members.

Decision: The Court ruled that the immunity under the Federal Communications Act even applies when the webmaster exercises judgment on what is allowed to remain on the site.

Comment: This immunity does not apply if the webmaster actually writes the defamatory material.

Leonard v. Robinson (2007) [332]

Facts: During the public portion of a Council Meeting, the operator of a towing company got into an argument with the town Supervisor over a license. During that argument, the operator said, "We're sick and tired of getting screwed. That's why you are in a (expletive deleted) lawsuit." He was charged under the state's anti-profanity statute.

Decision: The Court ruled the state law was unconstitutionally vague. Specifically: "Allowing prosecution where one utters "insulting" language could possibly subject a vast percentage of the populace to a misdemeanor conviction." "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers."

Olasz v. Welsh (2008) [333]

Facts: After a Council Member was repeatedly ruled "out of order," he was arrested and charged with a criminal disorderly person offense. The County Prosecutor threw out the complaint, and the Council Member sued the Council President for malicious prosecution. The Council Member admitted to disrupting the meeting but contended that his behavior was necessary to make his point.

Decision: The U.S. Court of Appeals ruled that "The Council President's actions to constrain the council member's "badgering, constant interruptions, and disregard for the rules of decorum constitute appropriate time, place and manner regulation."

State v. Chepilko (2009) [334]

Facts: The defendant was found guilty of violating municipal ordinances that prohibit the sale of merchandise on the Atlantic City boardwalk by taking photographs and then attempting to sell them to the subjects on two occasions. The defendant argued that this business activity is expressive conduct protected by the First Amendment.

Decision: The New Jersey Appellate Court ruled that the defendant's business activity did not predominately serve expressive purposes and was not entitled to First Amendment protection.

Comment: There is a tricky line between purely commercial enterprise and business activities that include protected expression.

Glik v. Cunniffe (2011) [335]

Facts: A bystander was arrested after filming Boston officers making an arrest in a park. The bystander was charged with wiretapping, disturbing the peace and aiding in the escape of a prisoner.

Decision: A U.S. District Court of Appeals unanimously held that the officers violated the bystander's constitutional rights. However, the Court also ruled that the right to film public officials and employees was subject to reasonable time, place and manner limitations.

Comment: Boston paid Glik's attorneys $170,000. Also see Fields v. Philadelphia. [336]

Rosenblatt v. Camilla (2012) [337]

Facts: At a Council Meeting just before an election, one Council Member publicly attacked another Council Member who was running for re-election. The Council Member also complained to the State Ethics Board about the candidate's conduct. The candidate sued for defamation. The judge rejected a motion for summary judgment, citing the fact that much of this occurred just before the election when the candidate was in a poor position to mount a public defense.

Decision: The Appellate Court threw out the lawsuit because this is the normal "give and take" in an election. This is exactly the type of lawsuit barred under Sullivan v. NY Times.

Comment: Candidates and political figures are fair-game, except in the most extreme situations.

Kean Federation of Teachers v. Morell (2018) [338]

Facts: A University teacher received a letter from the University President that she would not be nominated for reappointment. The Board published a tentative agenda indicating that the Board intended to discuss faculty reappointments during the public meeting, but did not send a Rice Notice. After a Board subcommittee reviewed the recommendations, the full Board voted in public session to approve. The Board also waited almost five months to release the minutes because it only meets five times a year. The Appellate Court ruled that public entities are required to issue Rice Notices to impacted individuals before they can discuss any personnel matter in either "open" or "closed session." The Appellate Court also ruled that all minutes must be released within 45 days of a meeting, even if that required the Board to meet at double its current frequency.

Decision: The New Jersey Supreme Court overruled the Appellate Court and held that Rice Notices were only required when a governing body planned to meet in "closed session" and discuss adverse employment actions. The purpose of a Rice Notice is limited to giving negatively impacted employees the ability to request that the matter be discussed in "open session."

The Court wrote that:

> "Forcing public bodies to issue Rice notices and robustly discuss all personnel matters, as the Appellate Division intimated, would intrude on a public body's prerogative as to how to conduct its meetings. The Appellate Division's holding on the Rice requirement takes that salutary notice procedure out of its context and places on public bodies an intrusive, expansive, and confusing notice requirement that extends beyond the plain language of the right of employees under N.J.S.A. 10:4-12(b)(8)."

The Court also overruled the requirement that the Board release minutes within 45 days of a meeting. The New Jersey Supreme Court held that waiting five months was unreasonable but left it to the Board to work out a more reasonable solution.

Conclusion

- Federal law recognizes that Public Bodies must maintain reasonable decorum, and speakers can be cut-off if they stray from the issue, are redundant or disruptive.
- Some states, such as New Jersey, make it more difficult to cut-off speakers.
- Even in New Jersey, a skilled Presiding Officer can still maintain decorum. Each local government should adopt an ordinance or resolution concerning decorum and meeting procedures.
- Your Municipal or Board Attorney is your first line of defense. The Attorney's role at meetings is to help the Presiding Officer maintain decorum and not become a combatant.
- Under Federal and New Jersey law, private citizens also have some First Amendment rights to record public officials and employees performing their duties, but that right is not absolute and is subject to reasonable time, place, and manner restrictions.
- Each local government needs a written procedure to address the right to record governmental facilities and field activities, should train all employees at the time of hire, and conduct a periodic site review of each facility to determine security vulnerabilities. A model policy is available in the Resources Section.

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[307] Some material in this chapter is from the League of Municipalities publication, "The Open Public Meetings Act," originally authored in 1996 by Albert Wolfe and the late Michael Pane. This publication was updated by Edward Purcell. MEL Fund Attorney Fred Semrau also contributed to this chapter.

[308] *N.J.S.A. 10:4-8 a*. provides that:

> *"Public body means a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds including the Legislature, but does not mean or include the judicial branch of the government, any grand or petit jury, any parole board or any agency or body acting in a parole capacity, the State Commission of Investigation, the Apportionment Commission established under Article IV, Section III, of the Constitution, or any political party committee organized under Title 19 of the Revised Statutes."*

[309] *N.J.S.A. 10:4-8b* provides that:

> *"Meeting means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering."*

[310] *N.J.S.A. 10:4:9 a.*
[311] *N.J.S.A. 10:4-9 b.* provides that:

> *"Upon the affirmative vote of three-quarters of the members present a public body may hold a meeting notwithstanding the failure to provide adequate notice if:*
> *(1) such meeting is required in order to deal with matters of such urgency and importance that a delay for the purpose of providing adequate notice would be likely to result in substantial harm to the public interest; and*
> *(2) the meeting is limited to discussion of and acting with respect to such matters of urgency and importance; and*
> *(3) notice of such meeting is provided as soon as possible following the calling of such meeting by posting written notice of the same in the public place described in section 3. d. above, and also by notifying the two newspapers described in section 3. d. by telephone, telegram, or by delivering a written notice of same to such newspapers; and*
> *(4) either (a) the public body could not reasonably have foreseen the need for such meeting at a time when adequate notice could have been provided; or (b) although the public body could reasonably have foreseen the need for such meeting at a time when adequate notice could have been provided, it nevertheless failed to do so."*

[312] *N.J.S.A. 10:4-12 b.* provides that the following may be discussed in "closed session":

> *"(3) material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance, and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by an institution or program, including but not limited to, information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress, or condition of any individual, unless the individual concerned (or, in the case of a minor or an incapacitated individual, the individual's guardian) shall request in writing that the material be disclosed publicly;"*

[313] *N.J.S.A. 10:4-12 b.*
[314] 282 A.2d 386, 1977
[315] *N.J.S.A. 10: 4 -14*
[316] Kean Federation of Teachers v. Morell, A-84-16 (2018)
[317] *N.J.S.A. 10:4-12 a.*
[318] McGovern v. Rutgers, A-113 (2010)
[319] 3:11-cv-02397-MAS-LHG (2013)
[320] 900 F.2d 1421 (1989)
[321] A-81-08 (2010)
[322] 376 U.S. 254 (1964)
[323] *The New Jersey Civil Rights Act, N.J.S.A.10:6-2(c)*
[324] Fields v. City of Phila, 862 F.3d 353 (3d Cir. 2017).
[325] State v. Chepilko, 405 N.J. Super. 446 (App. Div. 2009);
[326] *N.J.S.A. 2C:18-3(b)*
[327] 282 A.2d 386
[328] 67 F.3d 266 (9th Cir. 1995)
[329] 293 N.J. Super. 469 (App. Div. 1996)
[330] 356 N.J. Super 151
[331] 374 N.J. Super 475, 865 A.2d 711 (2005)
[332] U.S. Court of Appeals, Sixth Circuit, 05-1728 (2007)
[333] 547 F.3d 187 (2008)
[334] 405 Super 446 (App. Div. 2009)
[335] 655 F.3d 78, 82-83 (1st. Cir. 2011)
[336] 862 F.3d 353 (3d Cir. 2017)
[337] A-0713-11T3 (2012)
[338] A-84-16 (2018)

CHAPTER 17

OPEN PUBLIC RECORDS ACT

New Jersey adopted its first Right to Know statute in 1962 and significantly updated the law in 2001. Now known as the Open Public Records Act (OPRA),[339] the revised law:

- Defines what records are and are not "government records."
- Expands the public's right of access to "government records."
- Creates an administrative appeals process if access is denied.

OPRA provides the following overriding public policies for all document requests:

- "Government records" must be readily accessible for inspection, copying or examination by its citizens, with certain exceptions, for the protection of the public interest.
- Any limitations on the right of access to "government records" must be interpreted in favor of the public's right of access.
- A "Public Agency" has the responsibility and obligation to protect a citizen's personal information in its possession when disclosure of that information would violate the citizen's reasonable expectation of privacy."

Who May File an OPRA Request?

Although OPRA specifically references "citizens of this State," OPRA does not prohibit access to residents of other states. [340] While requestors may file OPRA requests without providing any personal contact information,[341] OPRA specifically prohibits "anonymous" requests for victims' records. [342]

There is no restriction prohibiting:

- The commercial use of "government records." [343]
- Requesting records concerning pending litigation. [344]

Definition of a "Government Record" [345]

Generally stated, a "government record" is any record that has been made, maintained, received or kept on file in the course of official business. Under OPRA, a "government record" includes printed records, tape recordings, microfilm, electronically stored records, including e-mails and data sets stored in a database, books, maps and photographs. In one case, it included the Mayor's personal e-mail account.

Public Records Exempt from OPRA

There are 24 specific exemptions:

1. Inter-Agency or intra-Agency advisory, consultative or deliberative material. This exception refers to draft documents or documents used in a deliberative process.

2. Legislative records. Specifically:

   - Information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, unless it is information the constituent is required by law to transmit.
   - Any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature. This provision does not apply to an otherwise publicly accessible report.

3. Medical examiner records, except when used in a criminal action.

4. Criminal investigatory records. The Act lists specific criminal investigatory information that must be disclosed. [346]

5. Victims' records, except that a victim of a crime may have access to their own records.

6. Trade secrets and proprietary commercial or financial information obtained from any source, including software obtained by a "Public Agency" under a licensing agreement which prohibits its disclosure.

7. Any record within attorney-client privilege.

8. Administrative or technical information regarding computer hardware, software and networks that would jeopardize computer security.

9. Emergency or security information or procedures for any buildings or facility that would jeopardize security of the building, facility or persons therein.

10. Security measures and surveillance techniques that would create a risk to the safety of persons, property, electronic data or software.

11. Information which, if disclosed, would give an advantage to competitors or bidders.

12. Information generated by, or on behalf of, public employers or public employees in connection with:
- Any sexual harassment complaint filed with a public employer.
- Any grievance filed by or against an individual.
- Collective negotiations, including documents relating to strategy or negotiating positions.

13. Communications between a "Public Agency" and its insurance carrier, administrative service organization or Risk Management Office.

14. Information which is confidential pursuant to Court Order.

15. Certificate of honorable discharge issued by the United States government, Form DD-214, filed with a "Public Agency." There is an exception for a veteran or their spouse or surviving spouse, who may have access to the veteran's own records.

16. Personal Identifiable Information (PII). [347] Specifically:
- Social Security Numbers
- Credit Card Numbers
- Unlisted Telephone Numbers
- Drivers' License Numbers

17. Certain records of higher education institutions.

18. Biotechnology trade secrets.

19. Convicts may not request personal information pertaining to the convict's victim or the victim's family. [348]

20. Ongoing investigations – any records pertaining to an investigation in progress by any "Public Agency" if disclosure of such record or records would be detrimental to the public interest. This provision shall not be construed to allow any "Public Agency" to prohibit access to a record that was open for public inspection, examination, or copying before the investigation commenced.

21. Public defender records that relate to the handling of any case, unless authorized by law, court order, or the State Public Defender.

22. Exemptions contained in other State or federal statutes and regulations, Executive Orders of the Governor, Rules of Court, Constitution of this State, or Judicial Case Law.

23. Personnel and pension records, except specific information identified as follows:

- An individual's name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received.
- When required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States or when authorized by an individual in interest.

- Data contained in information that disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information.

24. Privacy Interest: "a 'Public Agency' has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy."

Custodians of Government Records

OPRA defines the "Custodian of a government record" as the official designated by formal action of a "Public Agency's" Director or Governing Body with custody or control of the Agency's government records.[349] Some large state departments designate more than one Custodian. OPRA provides that the Clerk is the Custodian in a municipality. However, OPRA does not preclude the designation of deputy Custodians for particular types of records, which is common in large Police Departments.

What is a "Public Agency" under OPRA?

Only "Public Agencies" are subject to OPRA, including:

- The Executive Branch of State Government and all Independent State Agencies and Authorities, including all State Colleges and Universities.
- The Legislature and any Office, Board, Bureau or Commission created by the Legislative Branch.
- All Counties, Municipalities, School Districts, Fire Districts, Planning and Zoning Boards and other County and local Boards or Agencies and all Independent County or local Agencies and Authorities established by Municipal or County Governments.

The following Agencies are <u>not</u> subject to OPRA:

- The Judicial Branch of State Government or any Agency Officer or Employee. The Courts have adopted their own records disclosure policies and procedures.[350]
- Private businesses or not-for-profit entities. However, a private or not-for-profit entity may be subject to the provisions of OPRA, depending on the circumstances, if it exercises sovereign powers of government. Courts have ruled that both the New Jersey State League of Municipalities and the New Jersey State Firemen's Association are subject to OPRA.

Submitting OPRA Requests

A request for access to a government record must be in writing and hand-delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate Custodian.[351] A records request cannot be made verbally. Some "Public Agencies" have created systems that permit a citizen to submit an online request form.

If a request does not name specifically identifiable records or is overly broad, a Custodian may deny access. A Custodian may also seek clarification.

- **Example of an Overly Broad Request:** "Any and all records related to the construction of the new high school." The term "records" does not reasonably identify a specific government record.

- **Example of a Valid Request:** "Any and all e-mails between Jane Doe and John Smith regarding the construction of the new high school from January 1, 2009 to February 28, 2009." This request identifies a specific type of record, parties to the correspondence, dates and subject matter.

A Custodian is obligated to search for the identifiable government records listed in the request. A Custodian is not required to research files to figure out which records, if any, might be responsive to a broad and unclear request.

Other Media

OPRA provides that a Custodian must provide a copy of the record(s) in the medium requested, if the "Public Agency" maintains the record in that medium. The Custodian must convert the record to the medium requested, or provide the record in some other medium that is useful or meaningful to the requestor.

If the agency maintains the record in the medium requested, the Custodian can only charge the actual cost of copying (e.g. the cost of the floppy disk or CD-ROM). However, a Custodian may impose a special service charge related to conversion for extensive use of technology and labor for programming, clerical and supervisory assistance.

The charge must be based on the cost of the technology and labor actually incurred and may include charges incurred by an outside vendor. Before undertaking any conversion, the Custodian must first inform the requestor and give them the opportunity to accept or reject the extra fee. The Custodian may deny the request if the requester objects.

Deadlines

Custodians should fulfill a request as soon as possible, but no later than seven business days after the request is received, provided that the record is currently available and not in storage or archived. Day one of the seven business days is the day following the Custodian's receipt of the request.

OPRA requires that Custodians must ordinarily grant immediate access to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information. Exceptions may include instances in which the requested records are in use, in storage, or require medium conversion. In such instances, the Custodian must provide access as soon as possible. Agencies must use their best efforts to comply with this requirement.

Custodians may seek extensions of time beyond the seven business day deadline for legitimate reasons, such as the record being in use or storage). Custodians must request an extension from the requestor in writing within the statutorily mandated seven business days and provide an anticipated deadline date. The length of the extension must be reasonable, and failure to grant or deny access by the extended deadline date results in a "deemed denial" of the request.

Fees

In 2010, the Act was amended to establish a revised fee schedule of $0.05 per letter-size page or smaller, and $0.07 per legal-size page or larger. A "Public Agency" may charge a higher fee if it can demonstrate that its actual costs for duplication exceed these rates. However, be careful to follow the specific statutory guidelines.

In certain circumstances, an Agency may also collect a special service charge in addition to the actual cost of duplicating records. This could be applicable when the nature, format, manner of collection or volume of records to be copied is such that the record cannot be reproduced using ordinary equipment or in ordinary business size, such as a map or plan. Special service charges may also be applied when complying with the request involves an extraordinary expenditure of time and effort.

"Actual direct cost" means the hourly rate of the lowest level employee capable of fulfilling the request, not including fringe benefits. What warrants an imposition of a special service charge is extremely subjective, and the determination is made on a case-by-case basis. No special service charges can be established in advance by ordinance.

Redacting Records

Under OPRA, a government record that is otherwise publicly accessible may contain non-disclosable information that should be redacted. Suppose a record contains material that must be redacted, such as a social security number; in that case, the redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record. When redactions are made, the Custodian must explain the reason and identify the legal basis for each redaction using either the request form or a separate document.

Disruption to Agency Operations

If a request would substantially disrupt Agency operations, the Custodian may deny access to the record but only after first attempting to reach a reasonable solution with the requestor that accommodates the interests of both the requestor and the Agency. This is a subjective determination based on an Agency's available resources to fulfill a request.

Appeals

OPRA provides that a person who is denied access to a government record can choose one, but not both, of the following options:

- Filing a lawsuit in Superior Court: The complaint must be filed within 45 days of the denial. [352]
- File a complaint with the Government Records Council.

Prevailing Party Attorney's Fees

A requestor represented by counsel who prevails in any proceeding is entitled to a reasonable attorney's fee.

Knowing and Willful Penalty

A public official, officer, employee, or Custodian who knowingly and willfully violates OPRA and is found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty. The penalty is $1,000 for an initial violation, $2,500 for a second violation, and $5,000 for a third violation that occurs within ten years of an initial violation. [353] As of 2020, the Government Record Council has issued eight Knowing and Willful fines to five different Custodians. One Custodian was fined three times within ten years. [354]

Selected Case Studies

Note: The website of the New Jersey Government Records Council (GRC) has an extensive discussion of numerous cases. [355]

MAG Entertainment v. ABC (2005) [356]

Facts: In 2001, the New Jersey Division of Alcoholic Beverage Control filed charges against MAG Entertainment to revoke its license after a fatal accident. MAG subsequently filed an OPRA request seeking "All documents or records evidencing that ABC sought, obtained or ordered revocation of a liquor license for a charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident," and "all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity."

Decision: The Appellate Court ruled that the mere fact that MAG filed an OPRA request to discover material useful in its defense was not objectionable by itself. However:

> "The request failed to identify with any specificity or particularity the government records sought. MAG provided neither names nor any identifiers other than broad generic description of a brand or type of case prosecuted by the Agency in the past. Such an open-ended demand required the Division's records Custodian to manually search through the Agency's files, analyze, compile and collate information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation."

Government Records Council Opinion 2005-127 (2005)

Facts: A citizen requested "All documents, in electronic format, sent from or received by (the Mayor) to or from his personal e-mail account that relate in any manner to his position as a Fair Lawn Borough public official and/or the conduct of government by or for the Borough of Fair Lawn, from January 1, 2004 to May 31, 2005."

Decision: The GRC ruled that the request was valid and ordered the Borough to comply. In a subsequent case, the GRC determined that OPRA requests for e-mail must contain: "(1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) was transmitted, and (3) the identity of the sender or recipient." [357]

Comment: Officials who use their personal e-mail accounts on official business open themselves to numerous legal issues. The State Division of Archives and Records Management (DARM) established guidelines for managing electronic mail. [358] A copy of DARM's circular is available on its website. [359]

Avin v. Oradell (2005) [360]

Facts: The town rejected an OPRA request for the list of all homeowners who applied for a fire alarm or burglar permit in the last three years on the grounds that the documents fall under the emergency or security exemption.

Decision: The GRC upheld the town's decision by applying the "balancing test." In a situation like this, the GRC weighs the public's rights for information against the potential severity of the security exposure.

Discussion: There have been numerous cases along the same line. In 2012 the GRC upheld the decision to deny release of dog and cat licenses. [361] In another case, the GRC upheld the decision to access to building plans for a home. [362]

Mason v. Hoboken (2008) [363]

Facts: Over the period of a year, the plaintiff made 125 OPRA requests, most of which were responded to within the time limits. Some of the requests were made when the town's Business Administer was attending to his critically ill mother. The plaintiff sued, complaining that the town failed to adequately respond to some of the requests that were late. While the lawsuit proceeded, the town delivered all outstanding information. The plaintiff then applied for attorney's fees contending that the lawsuit was the catalyst for the town's compliance. The town argued that attorney's fees are not applicable in this case because there was no judgment or enforceable consent decree.

Decision: The New Jersey Supreme Court decided that the plaintiff was not entitled to attorney's fees. The Court ruled that under the catalyst theory, "Requestors are entitled to attorney's fees under OPRA, absent a judgement or an enforceable consent decree, when they can demonstrate: (1) a factual causal nexus between the plaintiff's litigation and the relief ultimately achieved: and (2) that the relief ultimately secured by plaintiffs had a basis in law." [364] In this case, the Court was impressed that the town had responded to numerous requests in a timely fashion and found that the lawsuit had not been the catalyst for the town supplying the remaining information.

Burnett v. County of Bergen (2009) [365]

Facts: The plaintiff requested copies of 2,559 roles of microfilm containing over eight million pages of real estate records to add it its national database. The information included personal identifiers, such as names, addresses, social security numbers, signatures and marital status.

Decision: The Appellate Court ruled that the social security numbers must be redacted at the requesters' expense before the documents could be released. The New Jersey Supreme Court upheld the Appellate Court and ruled that the privacy provision in the Act:

> "imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests."

O'Shea v. West Milford (2009) [366]

Facts: The plaintiff, a former resident of the Township, requested access to "All Use of Force reports on file with the Township or its police department pertaining to incidents occurring in 2006, 2007 and 2008." The request was denied because the reports were considered criminal investigatory records.

Decision: The Appellate Court overruled the town and determined the records were not subject to the exemption because the Attorney's General's guidelines on the Use of Force require Police Departments to complete these reports.

Comment: Previously, the GRC ruled that arrest reports are subject to OPRA with redactions.[367] The GRC ruled that arrest warrants were also subject to discovery under OPRA in 2013.[368] However, in 2018 the New Jersey Supreme Court ruled that motor vehicle recorder readouts were not subject to OPRA because they were not required to be made by law.[369]

Mathews v. Atlantic City (2009)

Facts: A frequent critic requested a "demotion list," including base salaries before and after the demotion. He complained that the document that he ultimately received did not contain that information. The City argued that no document exactly complied with the request.

Decision: The GRC ruled that a Custodian "was under no obligation to create a list compatible to the Complainant's OPRA request because OPRA does not require a Custodian to produce new documents …"

Comment: Electronic records may be treated differently depending on the circumstances. John Paff, a state-wide OPRA advocate, asked for specific information in e-mails sent by the Clerk and Police Chief over a two-week period, but not for the contents of the e-mails. The City objected on the grounds that Paff was effectively asking that a new document be created. The Appellate Court agreed with the City. However, the New Jersey Supreme Court reversed and ruled that the request was valid under OPRA because it was for a basic e-mail log that would have taken a few keystrokes to produce.[370]

Burnett v. Gloucester County (2010)[371]

Facts: The plaintiff requested documents related to "Any and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present." The county responded that many of these documents were in the files of the county's insurance broker.

Decision: The Court ruled that agreements settling claims involving the county were government records and that the county had an obligation to secure the requested records from its insurance broker.

Comment: The Court wrote that "Were we to conclude otherwise, a governmental Agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA."

Rodriguez v. Kean University (2014)[372]

Facts: The plaintiff requested documents concerning the University's current policy on disciplinary actions related to an ethics violation. Instead of providing these documents, the Custodian referred the requestor with a link to the internet address where the policy resided and offered to provide a hard copy of the record if the requestor could not access it online.

Decision: The GRC ruled that the Custodian's response was adequate.

Comment: Note that the Custodian referred the requester to the specific internet address and offered to provide a hard copy. This decision does not permit the Custodian to say, "It's on our website; find it yourself."

Gilleran v. Bloomfield (2016) [373]

Facts: The Township declined to release videotape from a security camera attached to the second story of Town Hall adjacent to the police station. The Township contended that allowing unrestricted access to the security camera videotape would reveal what is and is not captured by the camera and would undermine the purpose of having a security camera system.

Decision: The New Jersey Supreme Court agreed with the Township and held that the security exclusions precluded disclosure under OPRA.

Comment: In 2019, the GRC ruled that the Custodian lawfully denied access to surveillance camera footage from a public transit center. [374] The GRC also ruled against a parent who requested video of a school gym class and subsequent lockdown drill. The GRC decided that the disclosure of the drill video would create a safety risk to persons within the district's schools. [375]

North Jersey Media v. Lyndhurst (2017) [376]

Facts: A motorist crashed into a guard rail during a high-speed chase and reportedly placed the officers in danger by trying to drive away. The officers fired at the suspect and killed him. Among other things, reporters request copies of the dashcam videos.

Decision: The New Jersey Supreme Court ruled that, under the facts presented, dashcam recordings were subject to release under the Common Law right of access.

Carter v. Franklin Fire District No. 1 (2018) [377]

Facts: The plaintiff requested records relating to the Fire District's Political Action Committee (PAC) that were stored on the District's computer.

Decision: The GRC ruled that records of a Political Action Committee were not "government records" under OPRA even though they were stored on a government computer. The records in question were not made, maintained or received by the public entity in the course of official business. The Appeals Court upheld the GRC's decision.

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[339] Much of the material in this chapter is from the New Jersey Record Council's (GRC) "Citizen Guide to the Open Public Records Act (OPRA)."
[340] Scheeler v. Atlantic County JIF, 454 N.J. Super 621, App. Div. 2018
[341] White v. William Patterson Univ., GRC Complaint 2008-216 (2009)
[342] *N.J.S.A. 47:1A-2.2.*
[343] Spaulding v. Passaic County, GRC Complaint 2004-199 (2006)
[344] Darata v. Monmouth County, GRC Complaint No. 2009-312 (2011)
[345] *N.J.S.A. 47:1A-1.1.*
[346] *N.J.S.A. 47:1A-3.b.*
[347] Except for:
- Use by any government agency, including any court or law enforcement agency, in carrying out its functions,
- or any private person or entity acting on behalf thereof,
- or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by *Section 2 of P.L.1997, c.188 (C.39:2-3.4).*

[348] Information may only be released if it is necessary to assist in the defense of the requestor. A determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.
[349] *N.J.S.A. 47:1A-1.1*
[350] See www.judiciary.state.nj.us/superior/copies_court_rec.htm
[351] *N.J.S.A. 47:1A5g*
[352] Mason v. Hoboken, 196 N.J. 51, 76 (2008)
[353] *N.J.S.A. 47:1A-11.*

[354] Frank Caruso, Executive Director of the N.J. Government Records Council
[355] https://www.nj.gov/grc/meetings/present/Useful%20OPRA%20Cases%20by%20Subject%20(2019%20August).pdf
[356] 375 N.J. Super.534 (App. Div. 2005)
[357] Eleavage v. West Milford, GRC Complaint 2009-07 (2010)
[358] DARM circular 03-20-ST
[359] www.njarchives.or/links/electronic.htmln
[360] GRC Complaint 2004-176 (2005)
[361] Knehr v. Franklin Township, GRC No. 2012-38 (2012)
[362] Nase v. Middle Township, GRC No. 2016-273 (2018)
[363] 196 N.J. 51, 76 (2008)
[364] Two years earlier, an Appellate Court first applied "catalyst" rationale for attorney's fees in an OPRA case in Teeters v. DYFS, 387 NJ Super. 423 (App. Div. 2006). The New Jersey Supreme Court adopted the concept in Mason.
[365] 198 N.J. 408 (2009)
[366] 410 NJ Super, 371 (App. Div. 2009)
[367] Morgano v. Essex County, GRC No. 2007-156 (2008)
[368] Seabrooks v. Essex County, GRC no. 2012-230 (2013)
[369] Paff v. Ocean County, 235 NJ 1 (2018)
[370] Paff v. Galloway, 229 NJ 340 (2017)
[371] 415 NJ Super, 506 (App. Div. 2010)
[372] GRC Complaint 2013-69 (2014)
[373] 227 NJ 159 (2016)
[374] Howard v. N.J. Transit, GRC Complaint 2018 – 43 (2019)
[375] Street v. Mt Arlington BOE, GRC Complaint 2017-103 (2019)
[376] 163 A.3d 877, 229 N.J. 541 (2017)
[377] A-1068-16T1

Resources

Medical Examinations for Crossing Guards

Guidelines for Firefighter Physical Examinations

Model Title 59 Resolution Approving Plan Design

Model Indemnity Ordinance

Model Tort Claim Notice

MEL Insurance Guidelines for Contracts and the Use of Governmental Facilities

Checklist to Manage Special Events

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Model Policy Concerning the First Amendment Right to Record

Model Joint Insurance Fund Documents

Medical Examinations for Crossing Guards

Crossing guard candidates should complete the same medical history and physical examination required for pre-placement examinations designed for other municipal full-time positions. The examination should be repeated as follows:

- Up to age 39: every five years
- From 40 to 49: every two years
- 50 +: every year

The physical examination, vision and hearing tests should be conducted in a clinical setting by a physician with experience examining job applicants. To perform the functions of the crossing guard position, the applicant must be capable of standing for two hours or more at a time and be able to lift and hold in position a stop sign weighing approximately one pound while holding the opposite hand in an upright, raised position. The examining physician should be provided a job description listing the physical requirements for the position.

If abnormalities or deficiencies are identified as a result of the physical examination including vision and hearing tests, the candidate is not qualified for the position. As an option, candidates not meeting the standards can be referred to an appropriate specialist for further examination to determine their physical capacity to perform the duties of the position. If this option is pursued, the specialist must be provided with the results of first examination and the standards that are to be met. Until the specialist report is received, the candidate should not be permitted to serve as a crossing guard. If the specialist report confirms the earlier testing outcomes, the candidate is not qualified to serve as a crossing guard.

The following vision and hearing standards are excerpted from the New Jersey Crossing Guard Report, Copyright © 2007 I/O Solutions, Inc.

Vision Standards and Recommended Tests

Peripheral Vision

Visual field shall be 160 degrees in the horizontal meridian binocularly with or without correction. Any perimeter that can measure the horizontal field of vision can serve as the testing method. The extent of the visual field shall be determined along the horizontal meridian for each eye with a perimeter (confrontation fields are not acceptable.) Values less than 160 degrees are acceptable only if complete compensation occurs with the opposite eye in binocular viewing. Any central absolute scotoma must be completely compensated by the opposite eye.

Stereopsis

Using either the Titmus test (TST) or the Rand Dot Stereo test (RST) or the Random Dot E test: TST Wirt Circle #8 (50 seconds of disparity) RST or RDE Target #6 (50 seconds of disparity). Subject must identify which object stands out from the page wearing Polaroid eyeglasses.

Color Vision

In response to one of the following three editions of the Ishihara Pseudoisochromatic Plate Screening test, with the testing conducted one plate at a time, the applicant should achieve the following results:

- 38 plate edition: The first 21 plates - 9 errors or less. An individual who misses the first plate has failed.
- 24 plate edition: The first 15 plates - 6 errors or less
- 16 plate edition: The first 9 plates - 4 errors or less

Visual Acuity

The applicant must be able to read 20/30 letters with the dominant eye on the Standard Snellen optotype chart. The non-dominant eye must have 20/40 or better with best correction. The applicant is asked to read the smallest line of letters that can be read with one eye covered. This is repeated with the opposite eye covered. An applicant wearing contact lenses must meet the visual acuity standard with their contact lenses in place. A statement from the applicant's eye care professional must be presented confirming that contact lenses have been worn successfully for a minimum of four months.

Hearing Standards and Recommended Tests

The candidate must be tested in a sound booth. Both the sound booth and audiometer used for testing should be calibrated using the most recent ANSI standards, and have been calibrated with the past year. Calibration certificates should be on file and available for review.

Candidates qualify if they meet standards with or without amplification.

The crossing guard hearing standards are as follows:

- Hearing thresholds of 40dB or better in each ear at 500, 1K, and 2 KHz.
- Pure tone average thresholds at 500, 1K and 2K Hz 35dB or better in each ear.
- The hearing threshold at 4K Hz must be 45dB or better in each ear.

Guidelines for Firefighter Physical Examinations

Heart attack is the most common cause of on-duty firefighter fatalities. Yet, existing regulations do not require firefighters to pass periodic medical examinations. Every year, firefighters needlessly die "on-duty" because their medical conditions are not identified or properly treated. This is especially a problem with volunteer firefighters who often tend to be older than their counterparts in career departments.

Recommendations:

- **Pre-placement Physical Examinations:** This examination should be similar to that conducted for police candidates.
- **Periodic Reexaminations:** Incumbent firefighters should be required to complete a reexamination on an annual basis and this examination should include calculation of each firefighter's heart attack risk.

Background:

In 2007, the National Institute for Occupational Safety and Health (NIOSH) issued an alert that sudden cardiac death represents the most common cause of on-duty firefighter fatalities. The report concluded that 39% of fatalities involving career firefighters and 50% of fatalities involving volunteers are due to sudden cardiac death. The higher incidence among volunteers is due to the fact that volunteers tend to be older. 43% of the heart attacks involved firefighters over 55 and one-sixth involved firefighters over age 65.

In the United States, heart attacks are the number one cause of death, striking at least 600,000 Americans each year. In half of the cases, the first symptom is death. In a recent New England Journal of Medicine study, Dr. Stefanos Kates of Harvard University concluded that,

> "Firefighters do not have a higher risk of heart disease compared to the general population, but the sudden exertion of their work can trigger a heart attack in the same way shoveling snow can lead to a heart attack in someone else. Firefighters may begin their careers in better shape than others, but as they grow older they may acquire risk factors, such as high blood pressure and cholesterol as well as weight gain."

Despite growing awareness of the problem, the incidence of firefighter deaths from heart attacks has not changed in the last decade. The key to turning this around is to require every firefighter over 35 to have an annual cardiac risk assessment. Raymond Basri M.D., a diagnostic cardiologist who specializes in firefighter issues, wrote,

> "Any individual with risk factors above 10% over the next ten years should be made aware of the risk factors that could be improved to lower risk such as smoking or high blood pressure. All high-risk individuals should be asked to see their own doctors. The fire service should not exclude these members from serving, but ask that their own doctors ensure their safety and review their situation. The department's medical examiner should not accept any clearance for a member with chest discomfort and a high-risk score that does not include a stress test."

Daniel Samo, M.D., an advisor to the National Fire Protection Association (NFPOA) recommends that firefighters who have a cardiac risk score above 10% should be required to pass a stress test at 12 METS to establish that Ischemia (signs of the lack of oxygen to the heart) does not occur at the work level common to firefighting. Because of the nature of their work, fire fighters should also be encouraged to monitor and control their blood pressure, cholesterol and weight, and stop smoking to ensure that their risk of heart attack is within reasonable limits. Because of the high stress associated with all aspects of firefighting, it may not be sufficient to limit high risk individuals from interior firefighting.

Experience suggests that "exempt" fire fighters can also experience heart attacks while performing light duties such as directing traffic or operating a pump.

Current Examination Requirements:

At present, state regulations only require physical examinations for firefighters involved in special assignments such as HazMat teams. However, most towns require candidates to pass a medical before joining the fire department and a physical is also required to become a member of the NJ State Firemen's Association. This examination does not require that the candidate meet explicit physical standards, although it does require certification from the examiner that the applicant is free from disease and has no physical defects that would hinder the ability to perform the duties of a firefighter. This examination can be performed by any licensed physician.

The NJ Public Employee Occupational Safety and Health Administration (PEOSHA) requires that firefighters who are assigned to interior structural firefighting be qualified to use a respirator. Under this regulation, firefighters complete a questionnaire that is reviewed by a physician or other licensed health care professional. If in the judgment of the reviewer the questionnaire responses are satisfactory, no direct physical examination is required. The examiner must specifically identify limitations in the use of the respirator and if a follow-up medical evaluation is required.

All firefighters must also be fit tested for their respirator mask. No additional physical examinations are required by state or federal regulation, although some departments impose their own requirements. Therefore, most volunteer firefighters serve for an indefinite period of time with no regulatory requirement for reexamination. While career departments are more likely to require periodic physical examinations, many do not.

Efforts to Establish General Standards:

Every major national association representing firefighters recommends that fire departments establish a medical evaluation procedure that includes pre-placement, periodic and return to duty medical evaluations for firefighters based on uniform medical and physical fitness standards. These associations also recommend a variety of ongoing health and wellness programs. The following is a summary of their recommendations:

- National Fire Protection Association (NFPA) Standards 1500 and 1582 include detailed guidelines and protocols for conducting physical examinations and the development of comprehensive occupational health and wellness programs.
- The International Association of Firefighters (IAFF) and the International Association of Fire Chiefs (IAFC) have developed a number of initiatives centered on the development of wellness and fitness programs, and implementation guides.
- The National Volunteer Fire Council (NVFC) in collaboration with the US Fire Administration (USFA) has issued a health and wellness guide and detailed directions for a program to promote cardiac health.
- The National Fallen Firefighter Foundation (NFFF) has developed a program titled "Everybody Goes Home" which includes an initiative to develop national medical and fitness standards for firefighters.

Firefighter Concerns:

Firefighters are in general agreement that physical examinations for candidates should be based on uniform standards, and that periodic reexaminations should be conducted. Their concerns are centered on the following issues:

- The cost of a comprehensive candidate physical examination and periodic reexaminations must be appropriated. At present, most municipalities only appropriate funds for the candidate physical examination and periodic pulmonary function testing.
- Requiring a periodic physical examination might disqualify experienced incumbent firefighters from participation in structural firefighting.
- The standards established for a comprehensive candidate physical examination may be so rigorous that the pool of potential candidates may be severely diminished. Despite these concerns, firefighters generally support an effort to strengthen the physical examination procedures for candidates and a periodic reexamination for incumbent firefighters.

Recommendations:

Candidate Pre-Placement Physical Examinations:

Candidate examinations should be similar to that conducted for police candidates. The candidate examination will also serve as a baseline that can be used to measure any changes in physical conditions that are identified during periodic testing. The cost for pre-placement medical examinations range from approximately $300 to $900 depending on the provider and testing protocol.

Pre-placement examinations should include two components:

- A physical examination conducted by a licensed physician selected jointly by the fire department and the municipality. The examination should include a medical history, examinations, and any laboratory tests required to detect physical or medical conditions that could adversely affect the ability of the candidate to safely perform essential job tasks. The recommended examination should extend to all physical systems including, skin, ears, eyes nose, and throat, cardiovascular, respiratory, gastrointestinal, genitourinary, endocrine, metabolic, musculoskeletal, and neurological systems. In addition, the examination should include audiometry, visual acuity and peripheral vision testing, pulmonary function testing and an EKG if indicated. A detailed description of the candidate physical and medical standards is included in NFPA 1582: Standard on Comprehensive Occupational Medical Program for Fire Departments, 2007 edition, Chapter 6. In addition to a medical history, the examination should include an occupational history and completion of the Occupational Safety and Health Administration Medical Respirator Evaluation Questionnaire.
- A fitness evaluation of the physical capacity of the candidate to perform essential job functions as defined in the candidate firefighter's job description should be performed by registered physical therapist whose findings should be reviewed and approved by the authorized examining physician. A listing of essential job functions and the relevant standards of performance are included in NFPA 1582, Chapter 5, Essential Job Tasks.

Annual Reexamination Physicals:

Departments should also require annual reexamination consistent with NFPA Standard 1582, Chapter 7.4-7.7. Specifically, the following components should be required:

- A complete medical history including completion of the Occupational Safety and Health Administration Medical Respirator Evaluation Questionnaire.
- Physical examination of all major body systems
- Blood and urine tests to determine cholesterol, diabetes, chemical exposure
- Audiometric and vision examination to determine status in relation to the approved standard
- Pulmonary function test to determine status in relation to approved standard
- A resting EKG followed by a stress EKG if medically indicated

Post exposure testing as clinically indicated by medical history or by symptoms Firefighters should be required to show evidence that all immunizations and infectious disease screenings are up to date. They should also be encouraged to secure PSA, mammography and colon cancer screenings in accordance with schedules generally accepted by medical authorities. These screenings can be secured through their group health benefits plan. If not, they should be included in the examination. Firefighters who do not meet the objective standards included in their job descriptions could be offered an opportunity to correct the deficiencies and be retested, or as an alternative be offered an alternate position with physical standards that they can meet.

The information included in this report is not intended to serve as expert medical opinion and is not a substitute for seeking such opinions from a licensed medical provider with experience with the testing and certification processes described in this report. Anyone considering the development of a preplacement and periodic medical examination program is urged to seek such professional assistance.

References

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Firefighter Fatality Investigation Report F2005-30. NIOSH. March 17, 2006.

Health and Wellness Guide for the Volunteer Fire Service. National Volunteer Fire Council and the US Fire Administration. FA-267. January, 2004.

NFPA 1500 Standard on Fire Department Occupational Safety and Health Program, National Fire Protection Association, 2007 Edition.

NFPA 1582 Standard on Comprehensive Occupational Medical Program for Fire Departments, National Fire Protection Association, 2007 Edition.

Preventing Firefighter Fatalities Due to Heart Attacks and other Sudden Cardiovascular Events. US Department of Health and Human Services, Center for Disease Control and Prevention, National Institute for Occupational Safety and Health NIOSH). June, 2007.

OSHA Respirator Medical Evaluation Questionnaire. Appendix C to Section 29 CFR 1910.134. Department of Labor, Occupational Safety & Health Administration.

Physical Examination Guidelines Form 200. New Jersey State Firemen's Association. East Orange, NJ. Revised 2004.

The Volunteer Void. Fire companies in need of new blood. Andrew Vanacore. The Record. August 28, 2007.

The Fire Service Joint Labor Management Wellness-Fitness Initiative. International Association of Firefighters. Second Edition, 1999.

Model Resolution Approving Plan

WHEREAS, the (governing body type) of the (local government name), has decided to proceed with (describe project or item being purchased); and,

WHEREAS, the governing body has reviewed the (plans or specifications) prepared by (name) dated (date) concerning this (project or purchase).

NOW THEREFORE BE IT RESOLVED, by the (governing body type) of the (local government name) that pursuant to N.J.S.A. 59:4-6 the (plans or specifications) for the (project name or item purchase) are hereby approved.

BE IT FURTHER RESOLVED, that a certified copy of this resolution shall be placed in the permanent (project or purchase) file together with one copy of the (plan or purchase order) referred to above with a notation referencing to this resolution.

Model Resolution Approving Plan Change

WHEREAS, the (governing body type) of the (local government name), has decided to change the (specifications or plans) for the (describe project or item being purchased) previously approved by resolution (number and date); and,

WHEREAS, the governing body has reviewed modifications of the (plans or specifications) prepared by (specify) concerning this (project or purchase).

NOW THEREFORE BE IT RESSOLVED, by the (governing body type) of the (local government name) that pursuant to N.J.S.A. 59:4-6 the changes to the (plans or specifications) for the (project name or item purchase) are hereby approved.

BE IT FURTHER RESOLVED, that a certified copy of this resolution shall be placed in the permanent (project or purchase) file together with one copy of the (plan or purchase order) change referred to above with a notation referencing.

Model Resolution for Final Approval of Plan or Design of a Public Improvement

WHEREAS, the (governing body type) of the (local government name), has undertaken an improvement on (Lot number), (Block Number), which project is commonly referred to as (describe project); and,

WHEREAS, the plan or design for said improvement was previously approved by governing body by resolution (number); and,

WHEREAS, during construction of this improvement various changes to the original plan or design have been made with the knowledge and approval of the governing body.

NOW THEREFORE BE IT RESOLVED, that the (governing body type) of the (local government name) hereby formally approves the final "as built" plan or design of the improvement referred to above which final plan and design is reflected on the (identify plan):

BE IT FURTHER RESOLVED, that the governing body hereby invokes all applicable immunities including but not limited to N.J.S.A. 59:4-6.

BE IT FURTHER RESOLVED, that a certified copy of this resolution shall be placed in the permanent project file together with one copy of the plan with a notation referencing this resolution.

Model Indemnification Ordinance

An Ordinance authorizing the (local unit name) to Provide Legal Counsel and Indemnification for Officials, Employees and Appointees of the (local unit type) in Certain Actions Brought Against Said Officials, Employees and Appointees.

BE IT ORDAINED by the (governing body name) that:

Section 1. Except as hereinafter provided, the (local unit name), hereinafter known as the (local unit type) shall, upon the request of any present or former official, employee or appointee of the (local unit type) provide for indemnification and legal defense of any civil action brought against said person or persons arising from an act or omission falling within the scope of their public duties.

Section 2. The (local unit type) shall not indemnify any person against the payment of punitive damages, penalties, or fines, but may provide for the legal defense of such claims in accord with the standards set forth herein. The (local unit type) may refuse to provide for the defense and indemnification of any civil action referred to herein if the (governing body name) determines that: a) the act or omission did not occur within the scope of a duty authorized or imposed by law; b) the act or failure to act was the result of actual fraud, willful misconduct or actual malice of the person requesting defense and indemnification; or c) the defense of the action or proceeding by the (local unit type) would create a conflict of interest between the (local unit type) and the person or persons involved.

Optional wording for Section 2:

Section 2. Pursuant to 59:10-4, the indemnification and defense provided for in this ordinance shall include exemplary or punitive damages resulting from the employee's civil violation of State or federal law if, in the opinion of the (governing body name) the acts committed upon which the damages are based did not constitute actual fraud, actual malice, willful misconduct or an intentional wrong.

Section 3. The terms of this ordinance and the definition of official, employee and appointee are to be construed liberally in order to effectuate the purposes of this ordinance except that these terms shall not mean a) any person who is not a natural person; b) any person while providing goods or services of any kind under any contract with the (local unit type) except an employment contract; c) any person while providing legal or engineering services for compensation unless said person is a full-time employee of the (local unit type); and d) any person who as a condition of his or her appointment or contract is required to indemnify and defend the (local unit type) and/or secure insurance.

Section 4. The (local unit type) shall provide for defense of and indemnify any present or former official, employee or appointee of the (local unit type) who becomes a defendant in a civil action if the person or persons involved a) acted or failed to act in a matter in which the (local unit type) has or had an interest; b) acted or failed to act in the discharge of a duty imposed or authorized by law; and c) acted or failed to take action in good faith. For purposes of this ordinance, the duty and authority of the (local unit type) to defend and indemnify shall extend to a cross-claim or counterclaim against said person.

Section 5. In any other action or proceeding, including criminal proceedings, the (local unit type) may provide for the defense of a present or former official, employee or appointee, if the (governing body name) concludes that such representation is in the best interest of the (local unit type) and that the person to be defended acted or failed to act in accord with the standards set forth in this ordinance.

Section 6. Whenever the (local unit type) provides for the defense of any action set forth herein and as a condition of such defense, the (local unit type) may assume exclusive control over the representation of such persons defended and such person shall cooperate fully with the (local unit type).

Section 7. The (local unit type) may provide for the defense pursuant to this ordinance by authorizing its attorney to act in behalf of the person being defended or by employing other counsel for this purpose or by asserting the right of the (local unit type) under any appropriate insurance policy that requires the insurer to provide defense.

Section 8. This ordinance shall take effect immediately upon passage and publication as required by law.

> **Drafting Note:** *Title 59* permits local units to adopt an ordinance defending and indemnifying its officials, employees and appointees in certain lawsuits. However, in drafting the ordinance, care must be taken to avoid including certain non-employees, vendors, and firms providing goods and services that are not typically covered under local unit insurance policies (see section 2). In a few cases, local units have been required by their ordinances to indemnify certain persons even though their insurance policies provided no coverage. Local units that have already adopted indemnification ordinances should review these ordinances with their General Counsel and insurance advisor. If necessary, the ordinance should be amended to minimize the local unit's exposure

Model Notice of Tort Claim

CLAIMANT INFORMATION

Name:_____ Telephone:_____

Address:_____ Date of Birth:_____

_____ SSN: XXX XXX ___ ___ ___

ATTORNEY INFORMATION(if applicable)

Name:_____ Telephone:_____

Address:_____ Fax:_____

_____ File No._____

Send Notices Claimant to:_____ Attorney:_____

GENERAL INSTRUCTIONS:

Pursuant to the provisions of the *Title 59*, the New Jersey Tort Claims Act (here-in-after "*Title 59*"), the (name of local unit) (here-in-after the "type of local unit") has adopted this Notice of Tort Claim (here-in-after "Notice") form including these written questions and requests for the production of documents as the official form for the filing of claims against the (type of local unit).

The written questions are to be answered to the extent of all information available to the Claimant or the claimant's attorneys under oath. The fully completed Notice and the documents requested shall be returned to:

NOTE CAREFULLY:

Notices of Claim must be filed within 90 days after the incident giving rise to the claim. Upon a proper application, the New Jersey Superior Court may, under exceptional and rare circumstances, allow a Notice of Claim to be filed not later than one year after the date of the incident giving rise to the claim.

Your claim will not be considered filed as required by *Title 59* until this completed Notice of Claim has been received by the (type of local unit) Clerk. It is recommended that you mail the completed Notice Certified Mail Return Receipt Requested or personally hand-deliver the Notice to the Clerk's office. It is your burden to file this Notice and ensure that it is received within the deadline by the Clerk. Failure to provide the information requested, or such responses as "To Be Provided" or "Under Investigation" or similar non-responsive answers, will result in the Notice being treated as not having been filed in accordance with the Notice requirements of *Title 59*.

A. When, after a reasonable and thorough investigation using due diligence, you are unable to answer any question, or any part thereof, specify in full and complete detail the reason the information is not available to you and what has been done to locate the information. In addition, specify what knowledge or belief you have concerning the unanswered portion of the question and set forth the facts upon which the knowledge or belief is based.

B. When a question asks that you identify documents, a sufficient answer is to attach legible copies of these documents.

C. Where a question does not specifically request a particular fact, but where the facts are necessary in order to make the answer to the question either comprehensible, complete or not misleading, you are requested to include the fact or facts as part of the answer and the question shall be deemed specifically to request the fact or facts.

D. If you claim any form of privilege, whether based on statute or otherwise, as a ground for not answering a question or any part thereof, set forth in complete detail each and every fact upon which the privilege is based, including sufficient facts for the court to make a full determination whether the claim of privilege is valid.

E. Where a question asks for a date or an amount or any other specific information, it will not be adequate to state that the precise date, amount or other specific information is unknown to you, where you are capable of approximating the information requested.

F. Where a question requests that you "identify all writings," you should state with specificity the date, author, description, addressee (if any), nature, Custodian, and location of the writings referred to by the question, as well as the substance of the writing.

G. Where a question asks that you "identify all oral communications," you should state, with respect to every oral communications, the description of which is required by the question, (I) the date and place thereof, (II) who initiated the communication, (III) whether the communication was in person or by telephone or other form of transmission and specify which, (IV) the name, home address and telephone number, business address and telephone number, employer (present or last known), job title, occupation of each and every person who participated in or heard any part of the communication, and (V) the substance of what was said by each person who participated in the communication.

H. Where a question asks that you "identify all persons," state the name and present or last known business and residence address and telephone numbers, occupation and title, if any, of person whose identity is sought by the question.

I. For the purpose of these questions, "Person" shall include a partnership, joint venture, corporation, association, trust or any other kind of entity, as well as a natural person.

J. If any document to be produced in response to these questions contains information which must be treated as confidential in nature, identify that document and state the reason for the confidentiality in sufficient detail to allow for a determination on the issue of confidentiality. The (type of local unit) and its attorneys hereby warrant that the confidentiality of any document so identified will be respected and maintained until such time as a court having jurisdiction over the issue may rule on any disputed issue of confidentiality.

K. These questions request documents that are relevant to the subject matter of the claims and allegations of the Claimant. To the extent that any document does not relate, in its entirety, to the subject matter of the Claimant's claims or allegations, the document may be withheld. All other documents which deal directly with the subject matter of the Claimant's claims or allegations must be produced in response to these requests.

L. All responses to questions or objections thereto shall be prefaced by the particular question or subsection thereof.

M. An attempt has been made to provide adequate space for the answers. If you need more space to provide a fully responsive answer, attach supplementary pages, identifying the continuation of the answer with the number of the applicable question.

N. All documents produced shall be labeled and referenced to a particular document request or question. If the documents are produced in response to more than one question, this fact should be noted as well.

O. The questions and document requests shall be deemed continuing, so as to require supplemental answers from time to time up to the date of a trial, in the event that the claim results in litigation.

DEFINITIONS:

"Documents" means any written, recorded or graphic representation either produced or reproduced and any copy thereof, including, but not limited to, letters, memoranda, notes, minutes, summaries, forecasts, appraisals, surveys, calculations, inter-office communications, diaries, work sheets, telegrams, cables, telex messages, written agreements, invoices, press releases, books, records, financial statements, tapes, computer print-outs, computer tapes and/or disks, computer programs, drafts of any of the foregoing, magazines and other publications and any materials underlying, supporting or used in the preparations of any documents, now or formerly in the actual or constructive possession, custody or control of the deponent, and all copies thereof where the copy is not an identical copy of the original, such as where the copy contains written notations.

"Claimant" means the person or person on whose behalf this Notice of Claim is being filed.

"(name of local unit)" means the (type of local unit) along with any agent, official employee or volunteer of the (type of local unit) against whom a claim is asserted by the Claimant.

INFORMATION ON THE CLAIMANT

1. Claimant:

a. Name:

b. Any other name by which the Claimant has been known:

c. Current address:

d. Current telephone number(s):

Home:

Work:

Mobile:

Other:

e. Address at the time of the incident giving rise to the claim:

f. Marital status (at the time of the incident and current)

g. Identify each person residing with the claimant and the relation, if any, of the person to the Claimant.

h. Set forth all addresses of the Claimant for the last 10 years, the dates of the residence, the persons residing at the addresses at the same time as the Claimant resided at the address and the relation, if any, of the person to the Claimant.

INFORMATION ON THE CLAIM

1. Set forth the exact date, time and place of the incident forming the basis of the claim and the weather conditions prevailing at the time.

2. Set forth in complete detail in narrative form, the Claimant's version of the events that form the basis of the claim, specifically setting forth the names and addresses of all participants and the nature and extent of the participation of any individuals so identified.

3. Set forth any and all individuals who were witnesses to or who have knowledge of the facts of the incident which gave rise to the claim. Provide the full name and all data as required by the instructions preceding these questions.

4. Identify all public entities or public employees alleged to have caused the injury and specify as to each public entity or employee the act or omission alleged to have caused the injury.

5. If you allege wrongdoing by an employee or official of the (type of local unit), set forth the name and position of the employee or official and the exact nature of the alleged wrongdoing.

6. If you claim that the injury was caused by a dangerous condition of property under the control of (name of local unit), specify the nature of the alleged dangerous condition and the manner in which you claim the condition caused the injury.

7. If you allege a dangerous condition of property, set forth the specific basis on which you claim that the (type of local unit) was responsible for the condition and the specific basis on which you claim that the (type of local unit) was given notice of the alleged dangerous condition. General allegations such as "should have known" and "common knowledge" are insufficient.

8. If you or any other party or witness you propose to produce consumed any alcoholic beverages or any drugs or medications within six (6) hours before the incident forming the basis of the Claim, state (a) the person consuming the same and for each person (b) what was consumed (c) the quantity thereof (d) where consumed (e) the names and addresses of all persons present.

PROPERTY DAMAGE CLAIMS

If your claim is for property damage **only**, provide a description of the property damage and attach an estimate of the costs of repair. (If your claim is for property damage only, skip Questions 1 – 17 and go to Question 18 under PERSONAL INJURY CLAIMS.)

PERSONAL INJUIRY CLAIMS

1. With respect to the alleged injury forming the basis of the claim, was any complaint made to the (type of local unit) or to any official or employee of the (type of local unit).

2. If the answer to the question above is in the affirmative, state the time and place of the complaint and the person or persons to whom the complaint was made.

3. Describe in detail the nature, extent and duration of any and all injuries.

4. Describe in detail any injury or condition claimed to be permanent or residual, together with all present complaints.

5. If confined to any hospitals, state name and address of each and the dates of admission and discharge therefrom. Include all hospital admissions prior to and subsequent to the alleged injury forming the basis of the claim and set forth the reason for each admission.

6. If x-rays were taken, state (a) the address of the place where each was taken, (b) the name and address of the person who took them, (c) the date when each was taken, (d) what each disclosed, (e) where and in whose possession they now are. Include all x-rays, whether prior to or subsequent to the alleged injury forming the basis of the claim.

7. If treated by doctors, state (a) the name and present address of each doctor (b) the dates and places where treatments were received (c) the date of last treatment. Annex true copies of all written reports rendered to you or about you by any doctors whom you propose to have testify on your behalf.

8. If you have been treated by or have consulted with a psychologist, psychiatrist, social worker, or counselor, set forth the name and address of the psychologist, psychiatrist, social worker, or counselor; the dates of the consultation or treatment, the reasons for the consultation or treatment and the date of discharge from the treatment, and true copies of all written reports rendered to you or about you by any of the psychologists, psychiatrists, social workers, or counselors.

9. If you are still being treated, state (a) the name and address of each professional rendering treatment (b) the nature thereof and (c) where and how often the treatment is received.

10. If you claim that a previous injury, disease or illness has been aggravated, accelerated or exacerbated, state in detail the nature of each and the name and present address of each doctor who rendered treatment for the condition, the period during which treatment was received and the cause of the previous injury, disease or illness which is alleged to have been aggravated, accelerated or exacerbated.

11. If you have any physical impairment affecting your ordinary movements, hearing or sight, state in detail the nature and extent of the impairment and what corrective appliances, support or device you use to overcome or alleviate the impairment.

12. If any treatments, operation or other form of surgery in the future has been recommended, suggested or advised to cure, correct, remedy or alleviate any injury or condition resulting from the incident which forms the basis of the clam, state in detail, (a) the nature and extent of the treatment, operation or surgery (b) the purpose thereof and the results anticipated or expected (c) the name and address of the doctor who recommended or suggested or advised the treatments, operation or surgery (d) the name and address of the doctor who will administer or perform the same (e) the estimated medical expenses and disbursements to be incurred thereby (f) the estimated length of time of treatments, operation or surgery, period of hospitalization and period of convalescence (g) all other losses or expenditures anticipated as a result of the treatments, operation or surgery (h) whether it is your intention to undergo the treatments, operation or surgery and the approximate date.

13. Itemize any and all amounts expended or expenses incurred for hospitals, doctors, nurses, x-rays, medicines, care and appliances and state the name and address of each payee and the amount paid or owed each payee.

14. Itemize any and all future medical or other expenses to be incurred, not otherwise set forth herein.

15. If employed at the time of alleged injury forming the basis of the claim, state (a) the name and address of the employer (b) position held and the nature of the work performed (c) average weekly wages for the year prior to the injury (d) period of time lost from employment, giving dates (e) amount of wages lost, if any.

16. If other loss of income, profit or earnings is claimed, state (a) total amount of the loss (b) give a complete detailed computation of the loss (c) the nature and source of loss of the income, profit and earnings and dates of deprivation, thereof.

17. If you are presently employed, state (a) the date that the employment began (b) the name and address of the employer (c) the position held and the nature of the work performed (d) the average weekly wages. Attach copies of pay stubs or other complete payroll record for all wages received during the past year.

18. If you have received any money or thing of value for your injuries or damages from any person, firm or corporation, state the amounts received, the dates, names and addresses of the payors.

19. If any photographs, sketched, charts or maps were made with respect to anything which is the subject matter of the claim, state the date thereof, the names and addresses of the persons making the same and of the persons who have present possession thereof. Attach copies of any photographs, sketches, charts or maps upon which you intend to rely.

20. State the names and addresses of all persons who have knowledge of any relevant facts relating to the case, identify each person whom you intend to call as a witness, and set forth as to each person the nature of the testimony that you expect them to present.

21. If you or any of the parties to this action or any of the witnesses made any statements or admissions, set forth what was said; by whom said; date and place where said; and in whose presence, giving names and addresses of any person having knowledge thereof.

22. With respect to all expert witnesses, including treating physicians who are expected to support the claim of the Claimant, and with respect to any person who has conducted an examination of the Claimant or of the property alleged to be damaged and who may be called upon to testify in any proceeding with respect to the claim, state the witnesses' name, address and area of expertise, and annex a true copy of all written reports rendered to or about you. If a report is not written, supply a summary of any oral report.

23. Set forth the amount of your claim and the basis on which you calculate the amount claimed.

24. Identify and provide copies of all documents, memoranda, correspondence, reports (including police reports), etc. which discuss, mention or pertain to the subject matter of this claim.

DOCUMENT REQUEST: Produce all documents identified in your answers to the above questions.

CERTIFICATION

The undersigned, identified as the Claimant for the purpose of the above claim hereby certifies that the information provided is the truth and is the full and complete response to the questions, to the best of the knowledge, information and belief of the undersigned.

Signature:_____

Date:_____

AUTHORIZATION FOR RELEASE OF MEDICAL AND HOSPITAL RECORDS

To:_____ Date:_____

Re:_____ (Patient's Name)

Address:_____

You are hereby authorized and requested to disclose, make available and furnish to the attorney for the (name of local unit) or to the authorized representatives of the (type of local unit) all information, records, x-rays, reports or copies thereof relating to my examination, consultation, confinement or treatment and to permit him or her to inspect and make copies or abstracts thereof.

Approximate date of admission to hospital, first examination, treatment of consultation.

Date:_____

A photocopy of this release form, bearing a photocopy of my signature, shall constitute your authorization for the release of the information in accordance with the request made to you.

Signature:_____

AUTHORIZATION FOR RELEASE OF EMPLOYMENT RECORDS

To:_____ Date:_____

Re:_____ (Patient's Name)

Address:_____

You are hereby authorized and requested to disclose, make available and furnish to the attorney for the (name of local unit) or to the authorized representatives of the (type of local unit, all information, records, x-rays, reports or copies thereof relating to my examination, consultation, confinement or treatment and permit him or her to inspect and make copies or abstracts thereof.

A photocopy of this release form, bearing a photocopy of my signature, shall constitute your authorization for the release of the information in accordance with the request made to you.

Signature:_____

Note: Each Joint Insurance Fund adopts its own model Risk Management Consultant Agreement. Check with your JIF's Executive Director for a copy of the model used by your JIF.

PROVIDER shall make effective the following minimum insurances and follow all provisions, at its own expense, prior to commencement of the services in this agreement. Such insurance requirements shall apply to PROVIDER and any sub-providers of PROVIDER.

Group 1 (Small)

Scope: Maintenance, Repair, Small Services, Use of Premises

Insurance Coverages

1. Commercial General Liability: $1,000,000 Each Occurrence / $2,000,000 Aggregate
- **a.** Liquor Liability, Sexual Abuse / Molestation and Athletic Activities must be included
- **b.** Completed Operations must be included

2. Business Automobile Liability: $1,000,000 combined single limit any one accident
- **a.** All owned, hired or non-owned automobiles used in connection with this agreement

3. Professional Liability/Errors & Omissions Liability: $1,000,000 each claim / $1,000,000 annual aggregate
- **a.** Must not contain cyber, privacy or network-related exclusions

4. Workers' Compensation: Statutory
5. Employers' Liability: $1,000,000
6. Crime: $1,000,000
- **a.** Must include Employee Theft and Client Coverage

7. Cyber Liability: $1,000,000 Each Claim / $1,000,000 Aggregate

Group 2 (Medium)

Scope: Medium Maintenance/Repair, Small Renovation/Construction, Medium Services

Insurance Coverages

1. Commercial General Liability: $5,000,000 Each Occurrence / $5,000,000 Aggregate
- **a.** Liquor Liability, Sexual Abuse / Molestation and Athletic Activities must be included
- **b.** Completed Operations must be included

2. Business Automobile Liability: $1,000,000 combined single limit any one accident
- **a.** All owned, hired or non-owned automobiles used in connection with this agreement

3. Professional Liability/Errors & Omissions Liability: $1,000,000 each claim / $1,000,000 annual aggregate
    a. Must not contain cyber, privacy or network-related exclusions
4. Workers' Compensation: Statutory
5. Employers' Liability: $1,000,000
6. Crime: $1,000,000
    a. Must include Employee Theft and Client Coverage
7. Cyber Liability: $1,000,000 Each Claim / $1,000,000 Aggregate

Group 3 (Larger)

Scope: Renovation, Construction, Significant Service Agreements, MEL Firework/Mechanical Amusement Ride Requirements, MEL Public Entity Shared Services Guidelines

Insurance Coverages

1. Commercial General Liability: $5,000,000 Each Occurrence / $5,000,000 Aggregate
    a. Liquor Liability, Sexual Abuse / Molestation and Athletic Activities must be included
    b. Completed Operations must be included
2. Business Automobile Liability: $5,000,000 combined single limit any one accident
    a. All owned, hired or non-owned automobiles used in connection with this agreement
3. Professional Liability/Errors & Omissions Liability: $5,000,000 each claim / $5,000,000 annual aggregate
    a. Must not contain cyber, privacy or network-related exclusions
4. Workers' Compensation: Statutory
5. Employers' Liability: $1,000,000
6. Crime: $1,000,000
    a. Must include Employee Theft and Client Coverage
7. Environmental Liability: $5,000,000 Each Act / $5,000,000 Aggregate
8. Cyber Liability: $3,000,000 Each Claim / $3,000,000 Aggregate

Group 4 (Large)

Scope: Large Projects, Large Agreements

Insurance Coverages

1. Commercial General Liability: $10,000,000 Each Occurrence / $10,000,000 Aggregate
    a. Liquor Liability, Sexual Abuse / Molestation and Athletic Activities must be included
    b. Completed Operations must be included
2. Business Automobile Liability: $5,000,000 combined single limit any one accident
    a. All owned, hired or non-owned automobiles used in connection with this agreement

3. Professional Liability/Errors & Omissions Liability: $10,000,000 each claim / $10,000,000 annual aggregate

a. Must not contain cyber, privacy or network-related exclusions

4. Workers' Compensation: Statutory

5. Employers' Liability: $1,000,000

6. Crime: $5,000,000

a. Must include Employee Theft and Client Coverage

8. Environmental Liability: $10,000,000 Each Act / $10,000,000 Aggregate

9. Cyber Liability: $5,000,000 Each Claim / $5,000,000 Aggregate

Additional Insurance Provisions

1. Any combination of primary and umbrella/excess policies may be used to satisfy the limits. All below provisions shall also apply to the umbrella/excess policies for such coverages listed below.

2. All coverages shall remain in effect for the life of the agreement and for three (3) years thereafter. As respects any claims-made coverages, any combination of renewal policies and extended reporting periods may be used to satisfy such time period; however, no extended reporting period shall be effected for the work under this agreement until the last work has been completed.

3. Any retroactive dates, or the similar, must be no later than the effective date of this agreement.

4. All insurance shall be procured from insurers permitted to do business in the United States and having an A.M. Best rating of at least "A-: VIII", or the S&P equivalent.

5. If no such rating, self-insured or the like, MEMBER has the right to request and review the financials of such.

6. All General Liability, Automobile Liability, Professional Liability, Environmental Liability and Cyber Liability coverages shall name MEMBER as an additional insured on a primary and non-contributory basis.

7. MEMBER shall be named as Loss Payee on the Crime coverages.

8. All coverages shall contain Waiver of Subrogation provisions, as allowed by law, in favor of MEMBER.

9. At least thirty (30) days written notice of cancellation or non-renewal (10 days for non-payment) of any of the coverages shall be provided to MEMBER.

10. Full "cross liability" / "severability of interests" / "separation of insureds" provisions shall be provided on all coverages.

11. All insurances must be applicable to and cover the operations/services described in this agreement.

12. Remove reverse Hold Harmless clauses.

13. As respects individuals opting-out of the Workers' Compensation coverage, such individuals shall not work on the subject (project, services) in this agreement.

14. The amounts of the insurances or the carrying of the insurances described shall in no way be interpreted as relieving the PROVIDER of any responsibility or liability under the agreement. Any type of insurance or any increase in limits of liability not described above which the PROVIDER requires for its own protection or on account of statute shall be its own responsibility and at its own expense. PROVIDER shall promptly notify MEMBER and the appropriate insurance company(ies) in writing of any accident(s) or circumstance(s), as well as any claim, lawsuit or process received by the PROVIDER arising in the course of operations under the agreement. The PROVIDER shall forward such documents received to its insurance company(ies), as soon as practicable, or as required by its insurance policy(ies).

Special Event Safety Checklist

Instructions: Please fill out to make sure you are prepared prior to the start of the event..

Please Note: Local jurisdiction may have more stringent requirements.

Event Date:	Event Start Time:	Event End Time:
Event Name:		
Event Location (Bldg. & Room Number):		
Occupancy/ Capacity of Reserved Space:		
Anticipated Crowd Size:	Weather Forecast for time of event:	
Sponsoring Organization:		
Responsible Person:	Phone Number:	

Attach Organizational Chart & Communication Plan

FIRE ALARM SYSTEM (INDOOR EVENT)

1.	Is fire alarm panel in NORMAL condition?	Yes	No	N/A
2.	Are all fire alarm pull stations accessible and in clear view?	Yes	No	N/A
3.	Are evacuation plans posted?	Yes	No	N/A
4.	Has event staff been trained on emergency evacuation procedures?	Yes	No	N/A

AUTOMATIC SPRINKLER SYSTEM AND FIRE EXTINGUISHERS (INDOOR EVENT)

5.	Are automatic fire sprinkler main supply valves in the OPEN position and secured?	Yes	No	N/A
6.	Do gauges at the automatic fire sprinkler control valve read normal pressure(s)?	Yes	No	N/A
7.	Are there 18 inches of clearance below all sprinkler heads?	Yes	No	N/A
8.	Are all fire extinguishers accessible and unobstructed?	Yes	No	N/A
9.	Do all fire extinguishers read normal pressure, and have pin & seal in place?	Yes	No	N/A

MEANS OF EGRESS (INDOOR EVENT)

Name & after-hours phone number of Fire Official_____

10.	Are all exit signs illuminated and visible?	Yes	No	N/A
11.	Are all exit doors unlocked and working properly?	Yes	No	N/A
12.	Are all corridors, exit doorways, exit stairs or exit routes clear of obstructions?	Yes	No	N/A
13.	Are aisle ways and doorways free of obstructions i.e., power cords, tables, chairs, etc.?	Yes	No	N/A
14.	Is there an occupant load sign posted at the main exit/ entrance?	Yes	No	N/A
15.	Will the number of event guests not exceed the posted occupant load sign?	Yes	No	N/A

SEATING FOR PLACES OF ASSEMBLY (OVER 50 PEOPLE – INDOOR OR OUTDOOR EVENT)

16.	Was seating arrangement reviewed and approved by Fire Inspector?	Yes	No	N/A
17.	Are there no more than 14 chairs in any row of seats?	Yes	No	N/A
18.	If 250 chairs or more are in use, are they bound together in groups of at least three?	Yes	No	N/A
19.	Have bleachers been inspected? Do bleachers over 42" high have side & back rails?	Yes	No	N/A
20.	Are exterior seating areas clearly defined and marked?	Yes	No	N/A
21.	Is crowd monitoring and security proper for anticipated crowd size and behavior?	Yes	No	N/A

ELECTRICAL SAFETY (INDOOR OR OUTDOOR EVENT)

22.	Has Electrical / Fire Inspector (s) approved permit and conducted needed inspections? Documentation of permit and inspections are on-site	Yes	No	N/A
23.	Are electrical generating and distribution equipment properly protected from movement, contact from vehicles, workers, and visitors?	Yes	No	N/A
24.	Are electrical wires run in manner to minimize tripping hazards?	Yes	No	N/A
25.	Are electrical wires properly secured?	Yes	No	N/A
26.	Are extension cords in good condition with no frayed wires?	Yes	No	N/A
27.	Are extension cords secured to prevent tripping hazards?	Yes	No	N/A
28.	Are extension cords supplying power to no more than one appliance?	Yes	No	N/A
29.	Are electrical cords plugged into a ground fault circuit interrupter if used outdoors?	Yes	No	N/A
30.	Are all portable generators at least 25 feet from any structure, isolated from the public, and of sufficient capacity to run without refueling during the event?	Yes	No	N/A
31.	Are light fixtures below 8 feet high provided with protection from contact (shields, cages, glass, etc.)?	Yes	No	N/A
32.	Is lighting sufficient for all areas of event?	Yes	No	N/A

FOOD HYGIENE (Indoor or outdoor event)

33.	Has local Department of Health been notified and made appropriate inspections?	Yes	No	N/A
34.	Are gloves provided for the safe handling of foods? (Note: No bare hands should touch ready to serve foods)	Yes	No	N/A
35.	Are cold foods kept below 40° F and hot foods above 140° F?	Yes	No	N/A
36.	Is there a three compartment sink provided for cleaning and sanitizing utensils?	Yes	No	N/A
37.	Is there a means to wash hands with soap and water?	Yes	No	N/A
38.	Are signs posted reminding food handlers to wash hands after using restrooms?	Yes	No	N/A
39.	Is a class K fire extinguisher located in the cooking area adjacent to each group of cooking appliances?	Yes	No	N/A
40.	Are exterior cooking appliances at least 10 feet from any combustible wall or roof and at least 20 feet from any building air intake, door or window?	Yes	No	N/A

SPECIAL HAZARDS (INDOOR OR OUTDOOR EVENT)

41.	Are game / activity areas properly spaced and marked?	Yes	No	N/A
42.	Has security been established for handling / transporting cash?	Yes	No	N/A
43.	Are all hanging fabrics and decorations labeled flame retardant?	Yes	No	N/A
44.	Was a permit issued and approved for use of smoke generating equipment, open flame devices or pyrotechnics?	Yes	No	N/A

FIRE LANE & PARKING (INDOOR OR OUTDOOR EVENT)

45.	Are directional signs in place? Are traffic control cones, barricades, etc. in place?	Yes	No	N/A
46.	Are fire lanes clear and unobstructed?	Yes	No	N/A
47.	Are areas designated for emergency vehicles staging? Has area been approved by Police, Fire, and EMS commanders?	Yes	No	N/A
48.	Is parking area(s) sufficiently illuminated? Are traffic and parking control officers illuminated?	Yes	No	N/A

TENTS & CANOPIES (OUTDOOR EVENT)

49.	Do large tents/ canopies have certification papers indicating they are flame retardant?	Yes	No	N/A
50.	Are tents/canopies set up at least 10 feet from other tents/canopies and at least 10 feet from cooking equipment?	Yes	No	N/A
51.	Are tent stakes and ropes properly marked / protected from inadvertent contact?	Yes	No	N/A
52.	Have temporary stages and other raised platforms have been issued the appropriate building permits and have been inspected prior to use? Documentation is on hand?	Yes	No	N/A

WALKWAYS / RAMPS / STAIRS (INDOR OR OUTDOOR EVENT)

53.	Have walking surfaces been inspected for slip-trip-fall hazards?	Yes	No	N/A
54.	Are walking surfaces provided with sufficient lighting?	Yes	No	N/A
55.	Are stair treads and railings in good condition?	Yes	No	N/A

COMPRESSED GAS CYLINDERS (INDOOR OR OUTDOOR EVENT)

56.	Are unused compressed gas cylinders secured in an upright position and capped?	Yes	No	N/A
57.	Are there no more than two (2) propane gas tanks in a tent/booth?	Yes	No	N/A

OTHER CONSIDERATIONS (INDOOR OR OUTDOOR EVENT)

58.	For high risk events (e.g. mechanical bull riding, etc.), has vendor provided liability insurance certificate and or has event insurance been purchased? Consult with Risk	Yes	No	N/A
59.	Have event / open / athletic fields been inspected for slip-trip-fall hazards?	Yes	No	N/A
60.	Emergency services (first aid station, command post, etc.) are marked / identifiable?	Yes	No	N/A

ADDITIONAL COMMENTS

Signature of Event Coordinator or Designee Name (Printed) Date

Model Resolution (or Ordinance) Concerning Meeting Decorum

Drafting Note: This model is based on Norwalk, California Ordinance 2.08.020, Rules of Decorum for Meetings.

Whereas: The public are encouraged to speak at all open meetings of the (public entity type) in accordance with the provisions of this resolution (ordinance).

Whereas: In New Jersey, a citizen's right to speak is established by the Open Public Meetings Act. [378]

Whereas: In the 2010 decision in Besler v West Windsor-Plainsboro Regional BOE, [379] the New Jersey Supreme Court ruled that governing bodies should adopt their decorum rules sufficiently in advance so that the public has reasonable notice and governing bodies must apply these rules in a content neutral fashion without regard to the viewpoint being expressed. [380]

Now therefore be it resolved by the (governing body type) of (name of local government) that:

A. Decorum. Meetings of the (Public Entity Type) shall be conducted in an orderly manner to ensure that the public has a full opportunity to be heard and that the deliberative process is retained at all times. This also includes meetings of all boards and other bodies of the (public entity type). The presiding officer shall be responsible for maintaining the order and decorum of meetings.

B. Rules of Decorum: While any meeting is in session, the following rules of order and decorum shall be observed:

1. Rules of Order: Unless otherwise provided by law, Robert's Rules of Order shall govern the conduct of all meetings when necessary. The attorney for the body or the attorney's designee shall act as Parliamentarian.

2. Members: The members of the governing body and members of all boards and other bodies shall preserve order and decorum, and a member shall make best efforts not to interrupt or disrupt the proceedings or disturb any other member while speaking.

3. Matters Discussed in Closed Session: No person shall disclose in open session the matters discussed in closed session without the expressed authorization of the (public entity type) attorney or in accordance with the law.

4. Persons Addressing the Meeting: Each person who addresses the meeting shall do so in an orderly manner. Any person who utters physically threatening, patently offensive or abusive language, [381] or engages in any other conduct which disrupts, disturbs or otherwise impedes the orderly conduct of any meeting shall, at the discretion of the presiding officer or a majority of the members, be asked to refrain from such conduct.

5. Audience: No person at a meeting shall engage in disorderly or boisterous conduct, including the utterance of loud, physically threatening or abusive language, or other acts which disturb, disrupt or otherwise impede the orderly conduct of any meeting and the ability of the public to hear or participate. Any person who conducts himself in the aforementioned manner shall, at the discretion of the presiding officer or a majority of the body, be requested to refrain from such conduct.

6. Personal Comments: All statements are part of the public record and cannot be redacted.

C. Public Participation: The public is encouraged to address the members or ask questions during the following portions of the meeting:

1. Hearings: The meeting shall be opened for public comment at the appropriate point on the agenda for any hearing with respect to an ordinance or other specific matter required by law. (optional) The maximum that any individual speaker shall be allotted is ___ minutes.

2. Open Public Session: During this period of the agenda, the public is encouraged to comment on any matter of concern. (optional) The maximum that any individual speaker shall be allotted is ___ minutes.

D. Addressing the Meeting: No person shall address the meeting without first being recognized by the presiding officer. The following procedures shall be observed by persons addressing the members:

1. Each person shall step to the podium provided for the use of the public and shall state his or her name and address; the organization, if any, which he or she represents; and, if during the open public session of the meeting, the subject he or she wishes to discuss. Children under 18 shall not be required to give their last name or address.

2. During any hearing with respect to an ordinance or other specific matter required by law, speakers shall limit comments to the specific ordinance or matter on the agenda. Speakers may be requested not to be repetitious. [382]

3. All remarks shall be addressed to the body as a whole.

E. (Optional) Curfew: All meetings shall be adjourned by the presiding officer not later than _____ except the meeting may be extended by a vote of two-thirds of the members present.

E. Enforcement of Decorum: The rules of decorum set forth above shall be enforced in the following manner:

1. The presiding officer shall request that a person who is breaching the rules of decorum to be orderly.

2. If, after receiving a warning from the presiding officer, a person persists in disturbing the meeting, the presiding officer may order a temporary recess.

3. If the person repeatedly continues to disturb the meeting, the presiding officer may request that person to leave the meeting.

4. If such person does not leave the meeting and continues disruptive conduct, the presiding officer may order any law enforcement officer to remove that person from the chambers. [383]

5. If a meeting is disturbed or disrupted in such a manner as to make the restoration of order infeasible or improbable, the meeting may be adjourned or continued by the presiding officer or a majority of the members, and any remaining business may be considered at the next meeting.

Model Policy Concerning the First Amendment Right to Record

The (name of local unit) recognizes that under Federal and New Jersey law, private citizens have some First Amendment rights to record public officials and employees performing their duties. This includes the right to enter open areas of public and semi-public buildings or property to record government officials and employees performing their duties. This right is not absolute and is subject to reasonable time, place, and manner restrictions. The purpose of this policy is to provide officials and employees with guidance in the event of being confronted with an immediate decision regarding a member of the public exerting First Amendment rights.

1. Under the First Amendment, the public has the right to:

A. Record public officials or employees at traditional public forums such as parks and public streets and in limited public forums such as at public meeting rooms.

B. Record public officials and employees while they are in areas of public buildings and public spaces that are open to the public.

C. Record public officials and public employees while they are in areas not open to public access so long as the person recording or the recording equipment itself does not trespass into closed areas.

D. Record law enforcement activities outside of closed areas such as officers during the course of performing an arrest, traffic stop or truck inspection.

E. Record hazardous or dangerous property conditions.

2. The right to record has been found not to exist:

A. While filming areas not generally open to the public that pose legitimate safety and security risks such as jails, holding cells or bathrooms.

B. When the recorder interferes with the official's performance of their duties in or interferes with an investigation.

C. Recording a police conversation with a confidential informant.

D. Violating an ordinance prohibiting or restricting photography of private citizens for commercial resale without a permit.

3. The Safety Committee will review institutional security, signage, and other safeguards. Where necessary, the Committee will implement security sign-in, video surveillance, fencing, additional locks, and a system of government identification scan cards.

4. Best efforts will be made to post the following notice at the entrances of areas where the public is not permitted access:

> "NOTICE AGAINST TRESPASS: You are entering a restricted Area. Unauthorized Access is strictly prohibited beyond this point. Any person who attempt to or access any area beyond this point without prior written permission from municipal officials, shall be declared a trespasser, and a criminal complaint will be issued against you for violating N.J. Law 2C:28-3b (*N.J.S.A. 2C:28-3b*) 'Defiant Trespasser.' Furthermore, any person having authorization or permission to enter any area beyond this point may be asked to leave at any time. Whenever asked to leave, any such prior authorization/permission of access shall be deemed revoked, and any person(s) refusing to leave shall be declared a trespasser and a criminal complaint will be issued against you for violating N.J. Law 2C:28-3b (*N.J.S.A. 2C:28-3b*) 'Defiant Trespasser.'"

5. For areas of public property in that the general public is permitted access, similar signage will be posted at all public entrance and exits advising of the days and times the property is open to the general public and providing notice of the Defiant Trespasser statute.

6. In the event a member of the public attempts to trespass into restricted areas or otherwise interfere with governmental operations, public officials and employees will:

A. Stay calm and professional at all times. Be helpful, but do not go beyond what is required by law.

B. Politely request the individual to leave the restricted area or to move sufficiently away from the governmental activity and otherwise cease the interference.

C. In the event the individual refuses to comply with the request, the official or employee will refrain from engaging in any verbal confrontation or physical contact with the individual and immediately request assistance from law enforcement.

7. Anyone who engages in threats of physical violence or a significant pattern of harassment may be removed from government property by police and charged with a "defiant trespass" offense in violation of *N.J.S.A. 2C:18-3(b)*.

8. Whenever any person has been ejected from public property, a written "Notice to Person Ejected" will be provided to the person advising that they have been ejected from the property because they violated the defiant trespass statute and that any such re-entry is conditional upon obtaining written permission.

9. The Safety Committee will conduct a tabletop exercise or roleplaying drill for employees to prepare for a trespass or interference incident.

I hereby acknowledge that I have read this policy:

Name:_____ Title:_____

Signature:_____ Date:_____

[378] N.J.S.A. 40A 10:4-12-a provides "…a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal governing body or board of education, the length of the portion to be determined by the municipal governing body or board of education, for public comment on any governmental or school district issue that a member of the public feels may be of concern to the residents of the municipality or school district."
[379] A-81-08
[380] The Besler court wrote: "A public body may control its proceedings in a content-neutral manor by stopping a speaker who is disruptive or who fails to keep to the subject matter on the agenda. The government or a school board, however, has the burden of showing that its restriction of speech in a public forum was done in a constitutionally permissible purpose."
[381] Robert's Rules or Order provides that: "In debate a member must confine himself to the question before the assembly, and avoid personalities …. It is not allowable to arraign the motives of a member, but the nature or the consequences of a measure may be condemned in strong terms. It is not the man, but the measure, that is the subject of debate."
[382] In the often cited decision in White v Norwalk, California, a Federal Appeals court wrote: "In dealing with agenda items, the Council does not violate the first amendment when it restricts speakers to the subject at hand"…. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint the speaker is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious."
[383] In a 2002 decision (State v Charzewski: 356 N.J. Super 151) a New Jersey Appellate Court ruled that merely being disorderly at a Council meeting was not per se a criminal offense. The court ruled that the speaker's "conduct may have been rude and excessive, but it was not criminal. Not every interruption constitutes a criminal disruption."

Model Joint Insurance Documents

Resolution to Join

Resolution to Renew Membership

Indemnity and Trust Agreement

Model Risk Manager Contract

Risk Management Consultant Confidentiality Agreement

Enabling Statute *(N.J.S.A. 40A:10-36 et. seq.*)

RESOLUTION TO JOIN

(Name of Joint Insurance Fund)

> **Note:** Each Joint Insurance Fund adopts its own model resolution to join. Check with your JIF's Executive Director for a copy of the model used by your JIF.

WHEREAS, a number of local units of government in the State of New Jersey have joined together to form the (name of joint insurance fund), hereinafter the "FUND" as permitted by chapter 372 Laws of 1983 (40A:10 36); and,

WHEREAS, said FUND was approved to become operational by New Jersey Department of Banking and Insurance and the Department of Community Affairs and has been in operation since that date; and,

WHEREAS, the statutes and regulations governing the creation and operation of a Joint Insurance FUND contain elaborate restrictions and safeguards concerning the safe and efficient administration of the public interest entrusted to such a Fund.

NOW THEREFORE BE IT RESOLVED that the Governing Body of (name of local unit) does hereby agree to join the FUND subject only to the right to approve the initial assessment when the same is received from the FUND following processing of the application; and,

BE IT FURTHER RESOLVED, it is agreed as follows:

1. The (name of local unit) hereby begins its membership in the FUND for a three (3) year period, beginning _____ and ending December 31, _____.

2. The (name of local unit) hereby ratifies and reaffirms the Indemnity and Trust Agreement, Bylaws and other organizational and operational documents of the FUND as from time to time amended and altered by the Department of Banking and Insurance in accordance with the Applicable Statutes and administrative regulations as if each and every one of said documents were re-executed contemporaneously herewith.

3. The (name of local unit) agrees to be a participating member of the FUND for the period herein provided for and to comply with all of the rules and regulations and obligations associated with said membership.

BE IT FURTHER RESOLVED that the (name of local unit) is applying to the FUND for the following types of coverages:

1. Workers' Compensation including Employer's Liability;
2. General Liability including Police Professional Liability and Employee Benefits Liability;
3. Automobile Liability;
4. Blanket Crime;
5. Property including Boiler and Machinery;
6. Public Officials and Employment Practices Liability;
7. Volunteer Directors & Officers Liability;

8. Cyber;
9. Non-Owned Aircraft Liability;
10. Environmental Impairment Liability.

BE IT FURTHER RESOLVED that the Governing Body hereby adopts and approves of the bylaws of the FUND; and

BE IT FURTHER RESOLVED that (title) is authorized to execute the application for membership and the accompanying certification on behalf of the Governing Body; and

BE IT FURTHER RESOLVED that the Governing Body is authorized and directed to execute the Indemnity and Trust Agreement and such other documents signifying membership in the FUND as are required by the FUND's bylaws and to deliver same to the Executive Director of the FUND with the express reservation that said document shall become effective only upon the applicant's admission to the FUND.

RESOLUTION TO RENEW MEMBERSHIP

(Name of Joint Insurance Fund)

Note: Each Joint Insurance Fund adopts its own model resolution to renew membership. Check with your JIF's Executive Director for a copy of the model used by your JIF.

WHEREAS, the _____ , hereinafter the MEMBER is a member of the (Name of Joint Insurance Fund), hereinafter the FUND; and,

WHEREAS, said renewed membership terminates as of December 31, xxxx unless earlier renewed by agreement between the MEMBER and the FUND; and,

WHEREAS, the MEMBER desires to renew said membership;

NOW THEREFORE, be it resolved as follows:

1. The MEMBER agrees to renew its membership in the FUND and to be subject to the Bylaws, Rules and Regulations, coverages, and operating procedures thereof as presently existing or as modified from time to time by lawful act of the FUND.

2. The (title) and Clerk shall be and hereby are authorized to execute the agreement to renew membership annexed hereto and made a part hereof and to deliver same to the FUND evidencing the MEMBER's intention to renew its membership.

AGREEMENT TO RENEW MEMBERSHIP

(Name of Joint Insurance Fund)

> **Note:** Each Joint Insurance Fund adopts its own model resolution to renew membership. Check with your JIF's Executive Director for a copy of the model used by your JIF.

WHEREAS, (Name of Joint Insurance Fund) hereinafter the "FUND", is a duly chartered Joint Insurance Fund as authorized by NJSA 40A:10-36 et seq., and;

WHEREAS, (name of member) hereinafter the "MEMBER" is currently a member of said FUND, and;

WHEREAS, effective December 31, xxxx, said membership will expire unless earlier renewed, and;

WHEREAS, the governing body of the MEMBER has resolved to renew said membership;

NOW THEREFORE, it is agreed as follows:

1. The MEMBER hereby renews its membership in the FUND for a three (3) year period, beginning January 1, xxxx and ending January 1, xxxx*.

2. The MEMBER hereby ratifies and reaffirms the Indemnity and Trust Agreement, Bylaws and other organizational and operational documents of the FUND as from time to time amended and altered by the Department of Banking & Insurance in accordance with the Applicable Statutes and administrative regulations as if each and every one of said documents were re-executed contemporaneously herewith.

3. The MEMBER agrees to be a participating member of the FUND for the period herein provided for and to comply with all of the rules and regulations and obligations associated with said membership.

4. In consideration of the continuing membership of the MEMBER in the FUND, the FUND agrees, subject to the continuing approval of the Commissioner of Banking and Insurance to accept the renewal application of the MEMBER.

5. Executed the _____day of _____, _____as the lawful and binding act and deed of the _____, which execution has been duly authorized by public vote of the governing body.

INDEMNITY AND TRUST AGREEMENT

(Name of Joint Insurance Fund)

Note: Each Joint Insurance Fund adopts its own model indemnity and trust agreement. Check with your JIF's Executive Director for a copy of the model used by your JIF.

THIS AGREEMENT, made this day of (date) in the County of (County name), State of New Jersey, By and Between the (name of JIF), hereinafter the "FUND", and the Governing Body of the (name of local unit), a duly constituted local unit of government hereinafter the "MEMBER";

WITNESSETH:

WHEREAS, several local governmental units have collectively formed a Joint Insurance Fund as such an entity is authorized and described in NJSA 40A:10 36 et seq. and the administrative regulations promulgated pursuant thereto; and,

WHEREAS, the MEMBER has agreed to become a member of the FUND in accordance with and to the extent provided for in the bylaws of the FUND and in consideration of such obligations and benefits to be shared by the membership of the FUND.

NOW THEREFORE, it is agreed as follows:

1. The MEMBER accepts the FUND'S bylaws as approved and adopted and agrees to be bound by and to comply with each and every provision of the said bylaws and the pertinent statutes and Administrative Regulations pertaining to same and as set forth in the Risk Management Plan.

2. The MEMBER agrees to participate in the FUND with respect to the types of insurance listed in the FUND's Plan of Risk Management.

3. The MEMBER agrees to become a member of the FUND for an initial period of three (3) years, the commencement of which shall coincide with the local unit's Resolution to Join.

4. The MEMBER certifies that it has never defaulted any claims if self-insured and has not been canceled for non-payment of insurance premiums for a period of at least two years prior to the date hereof.

5. In consideration of membership in the FUND the MEMBER agrees that it shall jointly and severally assume and discharge the liability of each and every member of the FUND, all of whom as a condition of membership in the FUND shall execute a verbatim counterpart of this Agreement and by execution hereof the full faith and credit of the MEMBER is pledged to the punctual payment of any sums which shall become due to the FUND in accordance with the bylaws thereof, this Agreement the Fund's Risk Management Plan or any applicable Statute.

6. If the FUND in the enforcement of any part of this Agreement shall incur necessary expense or become obligated to pay attorney's fees and/or Court costs the MEMBER agrees to reimburse the FUND for all such reasonable expenses, fees and costs on demand.

7. The MEMBER and the FUND agree that the FUND shall hold all monies paid by the MEMBER to the FUND as fiduciaries for the benefit of FUND claimants all in accordance with NJAC 11:15 2.1 et seq.

8. The FUND shall establish separate Trust Accounts for each of the following categories of risk and liability:

a. Workers' Compensation including Employer's Liability;
b. General Liability including Police Professional Liability and Employee Benefits Liability;
c. Automobile Liability;
d. Blanket Crime;
e. Property including Boiler and Machinery;
f. Public Officials and Employment Practices Liability;
g. Volunteer Directors & Officers Liability;
h. Cyber;
i. Non-Owned Aircraft Liability;
j. Environmental Impairment Liability.

The FUND shall maintain Trust Accounts aforementioned in accordance with NJSA 40A: 10 36, NJAC 11:15.2 et seq, NJSA 40A: 5 1 and such other statutes as may be applicable. More specifically, each of the aforementioned separate Trust Accounts shall be utilized solely for the payment of claims, allocated claim expense and Excess Insurance or Reinsurance premiums for each such risk or liability or as "surplus" as such term is defined by NJAC 11:15 2.2.

9. Each local unit of government that shall become a member of the FUND shall be obligated to execute this Agreement.

RISK MANAGEMENT CONSULTANT AGREEMENT

(Name of Joint Insurance Fund)

Note: Each Joint Insurance Fund adopts its own model Risk Management Consultant Agreement. Check with your JIF's Executive Director for a copy of the model used by your JIF.

This Agreement, entered into this _____ day of _____, _____, between the _____(hereinafter referred to as the "MEMBER") and _____, a Corporation of the State of New Jersey, and _____, the responsible agent, having its principal office located at _____(hereinafter referred to as the "Consultant").

WHEREAS, the Consultant has offered the services to the MEMBER as the Professional Risk Management Consultant as required in the Bylaws of the (name of Joint Insurance Fund) hereinafter referred to as the FUND; and,

WHEREAS, the MEMBER desires to contract for these professional services pursuant to the resolution adopted by the Governing Body of the MEMBER at a meeting held on _____;_____

NOW THEREFORE, the parties in consideration of the mutual promises and covenants set forth in this Agreement, agree as follows:

1. For and in consideration of the compensation set forth in Paragraph 3 of this Agreement, the Consultant hereby agrees to provide Professional Risk Management services to the Municipality as follows:

A) The Consultant shall assist the MEMBER in identifying its insurable exposures and shall recommend professional methods to reduce, assume or transfer the risk of loss.

B) The Consultant shall assist the MEMBER in understanding and selecting the various types of coverage available from the FUND.

C) The Consultant shall review with the MEMBER any additional types of coverage that the Consultant believes the MEMBER should purchase that are not available from the FUND. The Consultant shall purchase and bind any additional types of coverage authorized by the MEMBER.

D) The Consultant shall assist the MEMBER in the preparation of applications, statements of values and other documents requested by the Fund. However, this Agreement does not include any appraisal work by the Consultant.

E) The Consultant shall review the MEMBER's annual assessment as prepared by the Fund, and shall assist the MEMBER in the preparation of its annual insurance budget.

F) The Consultant shall review the loss and engineering reports for the MEMBER, and shall assist the Safety Committee in its loss containment objectives within the Municipality.

G) The Consultant shall attend and actively participate in the MEMBER's Safety Committee activities and meetings, and shall present information to the Safety Committee on Safety related topics.

H) The Consultant shall attend the MEMBER's Accident Review Panel meetings and assist the MEMBER in determining the cause of accidents. The Consultant shall suggest any remedial actions necessary to avoid future accidents.

I) The Consultant shall assist the MEMBER in determining the necessary training for each employee in each Department based upon the employee's job description and in accordance with OSHA and other governmental regulations.

J) The Consultant shall assist the MEMBER in scheduling employee training, both internal and external, including the tracking of course attendance and completion of course requirements.

K) The Consultant shall assist the MEMBER with the timely and accurate reporting of all claims, which shall include the establishment and implementation of claims reporting procedures.

L) The Consultant shall assist, when requested by the MEMBER and/or the Claims TPA, with the investigation of claims filed against the MEMBER.

M) The Consultant shall review the MEMBER's loss data on a regular basis and prepare reports to the MEMBER on recent losses, open claims, and loss trends.

N) The Consultant shall review the performance of the MEMBER's Claims TPA on a quarterly basis including reserving practices, adjuster claim counts, and supervisor file review.

O) The Consultant shall assist the MEMBER by reporting to the Fund changes in exposures including the deletion and addition of vehicles, equipment, and properties and the contracting of MEMBER services to third parties.

P) The Consultant shall assist the MEMBER and Fund professionals in the annual renewal process including the gathering and verification of exposure data.

Q) The Consultant shall order Certificates of Insurance from the FUND.

R) The Consultant shall review Certificates of Insurance received by the MEMBER.

S) The Consultant shall review proposed contracts between the MEMBER and organizations and contractors to verify that the appropriate indemnification and hold harmless language is contained in the Contract and that the Certificate of Insurance Guidelines are being followed.

T) The Consultant shall evaluate and advise the MEMBER on the risk management aspects of public events being staged or sponsored by the MEMBER.

U) The Consultant shall review the annual coverage documents to verify the accuracy of the policies.

V) The Consultant shall respond to questions regarding coverage from the MEMBER's officials.

W) The Consultant shall actively attend and participate on the FUND Subcommittees as authorized by the Fund Bylaws.

X) The Consultant shall regularly attend the Monthly Executive Committee meetings of the FUND.

Y) The Consultant shall execute and file with the MEMBER, as part of this agreement, and the Executive Director's office a copy of the FUND's Confidentiality Agreement.

Z) The Consultant shall at least twice annually, prepare and present a written report to the Governing Body of the MEMBER outlining the MEMBER's Insurance and Safety Program.

AA) The Consultant shall assist the Municipality with the settlement of claims, with the understanding that the scope of the Consultant's involvement does not include the work normally performed by a public adjuster.

AB) The Consultant shall perform any other services required by the FUND's Bylaws.

2. The term of this Agreement shall be for a period of one (1) year commencing the first day of January, 20____, or from the effective date of coverage, unless this Agreement is terminated as set forth in Paragraph 5 of this Agreement.

3. The MEMBER authorizes the FUND to pay its Consultant, as compensation for services rendered, an amount equal to a dollar amount of _____($_____) or _____percent (____%) of the MEMBER's annual assessment as promulgated by the Fund. Said fee shall be paid to the Consultant within thirty (30) days of the payment of the MEMBER's assessment to the Fund. The Consultant shall receive no other compensation or commission for the placement or servicing of any coverage with the FUND.

4. For any type of coverage that is authorized by the MEMBER, to be purchased outside of the coverage offered by the FUND, the Consultant shall receive as full compensation, the normal brokerage commissions paid by the insurance company. The premiums for said policies shall not be added to the FUND's assessment in computing the fee outlined in Paragraph 3 of this Agreement.

5. Either party may cancel this Agreement at any time by notifying the other party, in writing, of their intention to terminate this Agreement. The termination shall be effective on the ninetieth day after service of the notice. The compensation provided for in Paragraph 3 shall be pro-rated to the date of termination.

ATTEST: _____ MEMBER:_____

ATTEST: _____ CONSULTANT:_____

DATE: _____

RISK MANAGEMENT CONSULTANT CONFIDENTIALITY AGREEMENT

(Name of Joint Insurance Fund)

> **Note:** Each Joint Insurance Fund adopts its own model Risk Management Consultant Agreement. Check with your JIF's Executive Director for a copy of the model used by your JIF.

WHEREAS, the (Name of Joint Insurance Fund), hereinafter the FUND, in order to properly discharge its duties and obligations, must consider and discuss certain confidential information regarding specific general liability (property, automobile, trip and fall, and civil rights), Workers' Compensation, Employment Practices Liability, Public Officials Liability and other types of claims against Member, and certain confidential information regarding any Members' claims history, loss ratios, litigation strategies, safety history, assessment strategies and renewal information; and

WHEREAS, the discussion of claims against Members, the evaluation of the factual and legal issues relating to said claims, and the discussion of settlement, liability, authority and other issues surrounding said claims must remain confidential in order to best respect the privacy of the individuals involved and/or to preserve the tactical and strategic defense of actual and/or pending litigation arising out of said claims; and

WHEREAS, the discussion of claims history, loss ratios, litigation strategies, safety history, assessment strategies and renewal information must also remain confidential in order to best protect the interest of the FUND and its Members; and

WHEREAS, any discussion relating to said claims may take place at meetings of the Fund Commissioners, meetings of the Executive Committee and meetings of other committee of the FUND or directly with one or more of the representatives of the Member, Assigned Defense Counsel designated by the UND and/or Fund Professionals; and

WHEREAS, the undersigned will, from time to time, participate in the consideration, evaluation, and discussion of claims, litigation strategies, assessment strategies, safety history, loss ratios and renewal information in order to provide their assistance and expertise to the FUND and the Member upon whose behalf the RMC is acting.

NOW, THEREFORE, I, the undersigned, hereby specifically agree as follows:

1. I will not disclose any matter discussed in any closed session, claims meeting, or other meeting or event in which I participate or which is set forth in any document made available to me or which is discussed with me by any person on behalf of the FUND and/or its members, to any person or entity not authorized to receive that information by the FUND.

2. I acknowledge that, by virtue of my position, I have a fiduciary relationship to the Member for which I perform RMC services and, in addition, I owe a duty to the FUND to best protect its Members' rights, privileges, and defenses regarding any discussions in which I may be involved, and that I am bound by the following standards:

a. Neither I nor any member of my immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of my responsibilities to the Member on whose behalf I am acting and to the FUND; and

b. I shall not use or attempt to use my position to secure unwarranted privileges or advantages for myself or others; and

c. I shall not act in my official capacity in any matter where I, a member of my immediate family, or a business organization in which I have an interest, has a direct or indirect financial interest or personal involvement that might reasonably be expected to impair my objectivity or independence or judgment; and

d. I shall not undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice my independence or judgment in the exercise of my responsibilities to the Member which I represent and to the FUND; and

e. Neither I or any business organization in which I have an interest shall represent any person or party other than the Member which I represent and the FUND in connection with any claim against any Member and the FUND; and

f. I shall not, at any time or in any manner, disclose, convey, transmit, copy or otherwise make available any information and/ or document(s) not generally available to the members of the public which I receive or acquire by reason of my position as an RMC for a Member and the FUND for the purpose of securing financial gain, directly or indirectly, for myself or for any other person;

3. I will use caution and discretion in the storage and/or disposal of any information or documents received, directly or indirectly, by me or by virtue of my relationship to the Member and the FUND.

4. I hereby recognize that, by virtue of my position as an RMC for a Member, I am entitled to participate in any or all discussions of claims related to the Member that I represent. I understand that the decision to permit me to participate in any of the discussions referred to previously in this document is a privilege granted by the FUND. I understand that the FUND and its Committees shall have the right to bar me from the discussion of any claims or other issues in the event that I violate any of the aforementioned standards. I also recognize that, by virtue of my position, I may acquire knowledge relating to other Members other than the Member which I represent and, accordingly, I agree to be bound by this document in relation to any such information I may acquire.

5. In the event of a violation of this agreement by me, I recognize that I may be subject to punishment, sanctions, dismissal, and/or penalties, or a combination of these remedies which may be imposed by the Member on whose behalf I am acting, and I further recognize that the FUND may request that the Member take such action.

IN WITNESS WHEREOF, I have hereunto affixed my signature on the date set forth below:

_____	_____	_____
(Print Name)	(Signature)	(Date)

NJSA 40A:10-36 et. seq. Joint Insurance Funds

40A :10-36 Joint insurance fund; definitions.

a. The governing body of any local unit, including any contracting unit as defined in section 2 of P.L.1971, c.198 (C.40A:11-2), may by resolution agree to join together with any other local unit or units to establish a joint insurance fund for the purpose of insuring against liability, property damage, and workers' compensation as provided in Articles 3 and 4 of chapter 10 of Title 40A of the New Jersey Statutes, insuring against loss or theft of moneys or securities, providing blanket bond coverage of certain county or municipal officers and employees for faithful performance and discharge of their duties as provided under section 1 of P.L.1967, c.283 (C.40A:5-34.1), insuring against bodily injury and property damage claims arising from environmental impairment liability and legal representation therefor to the extent that such coverages, as approved by the Commissioner of Banking and Insurance, are provided by the purchase of insurance and no risk is retained by the fund, providing contributory or non-contributory group health insurance or group term life insurance, or both, to employees or their dependents or both, through self-insurance, the purchase of commercial insurance or reinsurance, or any combination thereof, and insuring against any loss from liability associated with sick leave payment for service connected disability as provided by N.J.S.18A:30-2.1, and may appropriate such moneys as are required therefor. The maximum risk to be retained for group term life insurance by a joint insurance fund on a self-insured basis shall not exceed a face amount of $5,000 per covered employee or dependent or more if approved by the Commissioners of Banking and Insurance and Community Affairs. As used in this subsection: (1) "life insurance" means life insurance as defined pursuant to N.J.S.17B:17-3; (2) "health insurance" means health insurance as defined pursuant to N.J.S.17B:17-4 or service benefits as provided by health service corporations, hospital service corporations or medical service corporations authorized to do business in this State; and (3) "dependent" means dependent as defined pursuant to N.J.S.40A:10-16.

b. The governing body of any local unit, including any contracting unit as defined in section 2 of P.L.1971, c.198 (C.40A:11-2), may by resolution agree to join together with any other local unit or units to establish a joint insurance fund for the sole purpose of insuring against bodily injury and property damage claims arising from environmental impairment liability and legal representation therefor to the extent and for coverages approved by the Commissioner of Banking and Insurance.

40A :10-36.1 "Local unit" for purposes of C.40A:10-36 et seq.

For the purposes of P.L.1983, c.372 (C.40A:10-36 et seq.), "local unit" shall be deemed to include boards of education which join together with municipalities pursuant to P.L.1992, c.51 (C.40A:10-52 et al.).

40A :10-36.2. Establishment of joint insurance revolving fund, use of appropriated moneys

The governing body of any local unit that has established a joint insurance fund may by resolution or ordinance, as appropriate, establish a joint insurance revolving fund into which may be deposited any refunds paid to the local unit by the joint insurance fund to be dedicated for the payment of liabilities to the fund in future years. In no event shall amounts deposited in a joint insurance revolving fund exceed the annual amount contributed by the local unit to the joint insurance fund during the prior year. Moneys appropriated from the joint insurance revolving fund shall be used by the local unit to cover losses attributable to claims being paid by the joint insurance fund in future years which exceed contributions paid into the joint insurance fund by the local unit.

40A :10-36.3 Definitions relative to non-profit housing entities and joint insurance funds.

a. For the purposes of P.L.2004, c.146 (C.40A:10-36.3) a "non-profit housing entity" means an organization that provides housing meeting the low and moderate income limits established by the United States Department of Housing and Urban Development, if that organization is organized as a not-for-profit entity or as a limited partnership, in a low or moderate income housing project that has as its general partner a not-for-profit entity that has as its primary purpose the construction, rehabilitation or management of housing projects for occupancy by persons of low and moderate income.

b. A non-profit housing entity shall be deemed a local unit for the purposes of P.L.1983, c.372 (C.40A:10-36 et seq.) if it chooses to establish or join a joint insurance fund, pursuant to P.L.1983, c.372 (C.40A:10-36 et seq.), that is comprised of either non-profit housing entities or housing authorities or a combination thereof. Such joint insurance funds shall not have as its member local units that are municipalities, counties, boards of education, or fire districts.

c. Notwithstanding any provision of law to the contrary, a joint insurance fund established pursuant to P.L.1983, c.372 (C.40A:10-36 et seq.) that includes non-profit housing entities as members shall not join together with other local units, as otherwise provided in section 1 of P.L.1983, c.372 (C.40A:10-36), for the purpose of providing contributory or non-contributory group health insurance or group term life insurance, or both, to employees or their dependents or both.

d. Notwithstanding any provision of law to the contrary, a joint insurance fund established pursuant to P.L.1983, c.372 (C.40A:10-36 et seq.) that includes non-profit housing entities as members may participate in joint insurance funds:

(1) where the membership is exclusively comprised of other joint insurance funds and whose purpose is to provide excess levels of coverage;

(2) where the membership is exclusively comprised of other joint insurance funds and whose purpose is to accept the transfer of residual claims liabilities; or

(3) whose purpose is to provide environmental impairment liability insurance.

e. A joint insurance fund that has as its members non-profit housing entities shall operate pursuant to the provisions of P.L.1983, c.372 (C.40A:10-36 et seq.).

40A :10-37. Insurance fund commissioners; appointment, terms, compensation

Upon the establishment of a joint insurance fund, the officer or body of each local unit having the power to make appointments for the unit shall appoint one member of the governing body or employee of the local unit to represent that local unit as insurance fund commissioner. Each local unit may also appoint an alternate insurance fund commissioner who shall be a member of the governing body or employee of the local unit. Commissioners and alternates who are members of the governing body shall hold office for two years or for the remainder of their terms of office as members of the governing body, whichever shall be less, and until their successors shall have been duly appointed and qualified. Commissioners and alternates who are employees of the local unit shall hold office at the pleasure of the appointing officer or body. In the event that the number of local units represented is an even number, an additional commissioner shall be annually selected by the participating local units on a rotating basis. If the total number of member local units exceeds seven, the commissioners shall annually meet to select not more than seven commissioners to serve as the executive committee of the fund. The commissioners may also select not more than seven commissioners to serve as alternates on the executive committee. The executive committee shall exercise the full power and authority of the commission. Vacancies on the executive committee shall be filled by election of the entire board. The commissioners shall serve without compensation, except that the commissioners may vote to pay themselves a fee for attending commission meetings not to exceed $150 per meeting and the commissioners may vote to pay commissioners who serve on an executive committee a fee for attending executive committee meetings not to exceed $150 per meeting. Any vacancy in the office of insurance fund commissioner or alternate, caused by any reason other than expiration of term as a member of the local unit governing body, shall be filled by the appointing authority in the manner generally prescribed by law. The commission shall annually elect a chairman and a secretary.

In the case of a joint insurance fund established for the purposes of providing environmental liability coverage pursuant to subsection b. of section 1 of P.L.1983, c.372 (C.40A:10-36), each member of that joint insurance fund shall have proportional voting based upon the current year's assessment.

40A :10-38 Powers, authority.

a. The commissioners of a joint insurance fund shall have the powers and authority granted to commissioners of individual local insurance funds under the provisions of subsections a., b., c., and e. of N.J.S.40A:10-10.

b. The commissioners may invest and reinvest the funds, including workers' compensation funds, as authorized under the provisions of subsection b. of N.J.S.40A:10-10. The commissioners may, subject to the cash management plan of the joint insurance fund adopted pursuant to N.J.S.40A:5-14, delegate any of the functions, powers and duties relating to the investment and reinvestment of these funds, including the purchase, sale or exchange of any investments, securities or funds to an investment or asset manager. Any transfer of investment power and duties made pursuant to this subsection shall be detailed in a written contract for services between the joint insurance fund and an investment or asset manager. The contract shall be filed with the Commissioner of Banking and Insurance and the Commissioner of Community Affairs. Compensation under such an arrangement shall not be based upon commissions related to the purchase, sale or exchange of any investments, securities or funds. In addition to the types of securities in which the joint insurance fund may invest pursuant to section 8 of P.L.1977, c.396 (C.40A:5-15.1), a joint insurance fund may invest moneys held in the fund in bonds, notes, and other obligations issued by an agency or corporation of the federal government or a governmental entity established under the laws of this State, provided that the agency, corporation, or governmental entity responsible for the issuance of the bonds, notes, or other obligations is not in default as to the payment of principal or interest upon any of its outstanding obligations, and provided further that the bonds, notes, or other obligations are purchased at fair market value, guaranteed as to interest and principal, and have a credit rating of A3 or higher by Moody's Investor Services, Inc., A- or higher by Standard & Poor's Corporation, and A- or higher by Fitch Ratings, except that two of the three ratings is sufficient and further provided that the Commissioner of the Department of Community Affairs, in consultation with the Commissioner of the Department of Banking and Insurance, shall promulgate rules and regulations to limit the duration of the long-term investments and to cap these investments at an appropriate percentage of a joint insurance fund's overall investment portfolio. If a rating for the bonds, notes, or other obligations has not been obtained from two of the credit rating agencies, the bonds, notes, or other obligations may be purchased if the agency, corporation, or governmental entity responsible for the issuance meets the minimum rating criteria specified by the previous sentence and if the bond offering has the unconditional guarantee of the agency, corporation, or governmental entity responsible for the issuance.

c. The commissioners may transfer moneys held in the fund to the Director of the Division of Investment in the Department of the Treasury for investment on behalf of the fund, pursuant to the written directions of the commissioners, signed by an authorized officer of the joint insurance fund, or any investment or asset manager designated by them. The commissioners shall provide a written notice to the director detailing the extent of the authority delegated to the investment or asset manager so designated to act on behalf of the joint insurance fund. Moneys transferred to the director for investment shall be invested subject to section 8 of P.L.1977, c.396 (C.40A:5-15.1), and in accordance with the standards governing the investment of other funds which are managed under the rules and regulations of the State Investment Council. In addition to the types of securities in which the joint insurance fund may invest pursuant to section 8 of P.L.1977, c.396 (C.40A:5-15.1), a joint insurance fund may invest in debt obligations of federal agencies or government corporations with maturities not to exceed 10 years from the date of purchase, excluding

mortgage backed or derivative obligations, provided that the investments are purchased through the Division of Investment and are invested consistent with the rules and regulations of the State Investment Council.

d. Moneys transferred to the director for investment may not thereafter be withdrawn except: (1) pursuant to the written directions of the commissioners signed by an authorized officer of the joint insurance fund, or any investment or asset manager designated by them; (2) upon withdrawal or expulsion of a member local unit from the fund; (3) termination of the fund; or (4) in specific amounts in payment of specific claims, administrative expenses or member dividends upon affidavit of the director or other chief executive officer of the joint insurance fund.

e. The commissioners or the executive board, as the case may be, of any joint insurance fund established pursuant to the provisions of this act shall be subject to and operate in compliance with the provisions of the "Local Fiscal Affairs Law" (N.J.S.40A:5-1 et seq.), the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.) and such other rules and regulations as govern the custody, investment and expenditure of public funds by local units.

40A :10-38.1. through 40A :10-38.12 grants environmental joint insurance funds the power to issues bonds. As of 2020, no joint insurance fund has exercised this authority.

40A :10-38.13. Insurance producers

The bylaws of a joint insurance fund may include procedures to recognize and pay commissions or fees to insurance producers appointed by the fund, if any, or producers appointed by the member local units, if any, to advise the member local units on insurance related matters and to provide other related services to member local units as specified in the bylaws.

The commissioners of a joint insurance fund shall file with the commissioner a description of any producer arrangement plan by which producers, who shall be licensed pursuant to P.L.1987, c.293 (C.17:22A-1 et seq.), represent member local units in their dealings with the joint insurance fund. The description shall include, but not be limited to, copies of all producer contracts, which shall include a description of the producers' obligations, responsibilities and compensation; duration of contracts; and an indication whether the contracts are subject to renewal.

Whenever a joint insurance fund or member local unit employs a producer to perform risk assessment or risk management, the commissioners of the joint insurance fund shall file with the Commissioner of Insurance a copy of the producer contract for review by the commissioner.

40A :10-38.14 Joint insurance fund to maintain Internet website; contents.

The joint insurance fund shall maintain an Internet website. The purpose of the website shall be to provide increased public access to the joint insurance fund's operations and activities. The following information, if applicable, shall be posted on the joint insurance fund's website:

a. a description of the joint insurance fund's mission and responsibilities;

b. the budget once adopted for the current and immediately prior fiscal years. Commencing with the fiscal year next following the effective date of P.L.2011, c.167 (C.4:24-20.1 et al.), the budgets of at least three consecutive fiscal years shall be available on the website;

c. the most recent Comprehensive Annual Financial Report and the annual independent audit or other similar financial information;

d. the annual independent audit for the most recent fiscal year and the immediately prior fiscal year. Commencing with the fiscal year next following the effective date of P.L.2011, c.167 (C.4:24-20.1 et al.), the annual audits of at least three consecutive fiscal years shall be available on the website;

e. the joint insurance fund's official policy statements, bylaws, risk management plan and cash investment policy plan that are deemed relevant by the commissioners to the interests of the residents within the jurisdiction of the fund members;

f. notice, posted pursuant to the "Senator Byron M. Baer Open Public Meetings Act," P.L.1975, c.231 (C.10:4-6 et seq.), of a meeting of the insurance fund commissioners, setting forth the time, date, location, and agenda of the meeting;

g. the minutes of each meeting of the insurance fund commissioners including all resolutions of the commission and their committees for the current fiscal year. Commencing with the fiscal year next following the effective date of P.L.2011, c.167 (C.4:24-20.1 et al.), the approved minutes of meetings for at least three consecutive fiscal years shall be available on the website;

h. the name, mailing address, electronic mail address, if available, and phone number of every person who exercises day-to-day supervision or management over some or all of the operations of the joint insurance fund; and

i. a list of attorneys, advisors, consultants, and any other person, firm, business, partnership, corporation, or other organization which received any remuneration of $17,500 or more during the preceding fiscal year for any service whatsoever rendered directly to the joint insurance fund. For the purposes of this section, "rendered directly to the joint insurance fund" shall not include claim payments to service providers for services rendered to third party claimants, individual joint insurance fund members, their employees, or eligible dependents arising out of claims made under the benefit plans provided through the joint insurance fund.

40A :10-38.15 Claims experience information provided by joint insurance fund.

A joint insurance fund established pursuant to P.L.1983, c.372 (C.40A:10-36 et seq.) and subsection e. of section 1 of P.L.1979, c.230 (C.40A:10-6) for the purposes of providing health benefits or health insurance coverage shall provide at no cost to the requestor, and not more than once in a 24-month period, complete claims experience data to a public employer that participates in the joint insurance fund and makes a written request for its claims experience information, including loss reports and large claims data. The joint insurance fund shall provide the information in an electronic and manual format to the participating public employer who has made a written request for its information, within 60 days of the receipt of the written request made by the public employer. Notwithstanding the above, the joint insurance fund shall issue claims experience data only in a manner that complies with the privacy requirements of the federal Health Insurance Portability and Accountability Act of 1996, Pub.L.104-191, and related regulations.

40A :10-39. Bylaws for joint insurance fund

The commissioners shall prepare and, after the approval, by resolution, of the governing body of each participating local governmental unit, shall adopt bylaws for the joint insurance fund. The bylaws shall include, but not be limited to:

a. Procedures for the organization and administration of the joint insurance fund, the insurance fund commission and, if appropriate, the executive board of the fund. The procedures may include the designation of one-member local unit to serve as the lead agency to be responsible for the custody and maintenance of the assets of the fund and such other duties as may be assigned by the commissioners of the fund;

b. Procedures for the assessment of members for their contributions to the fund and for the collection of contributions in default;

c. Procedures for the maintenance and administration of appropriate reserves in accordance with sound actuarial principles;

d. Procedures for the purchase of commercial direct insurance or reinsurance, if any;

e. Contingency plans for paying losses in the event that the fund is exhausted;

f. Procedures governing loss adjustment and legal fees;

g. Procedures for the joining of the fund by a non-member local unit;

h. Procedures for the withdrawal from the fund by a local unit;

i. Procedures for the expulsion of a member local unit;

j. Procedures for the termination and liquidation of the joint insurance fund and the payment of its outstanding obligations;

k. Such other procedures and plans as the Commissioner of the Department of Insurance may require by rule and regulation.

40A :10-40.1 Participation in joint cash management and investment program.

Notwithstanding the provisions of any other law to the contrary, and in addition to the powers otherwise conferred by law, the commissioners of a joint insurance fund established pursuant to P.L.1983, c.372 (C.40A:10-36 et seq.), and the trustees of a joint insurance fund established pursuant to P.L.1983, c.108 (C.18A:18B-1 et seq.) may amend the plan of risk management of their respective funds to participate in a joint cash management and investment program with other joint insurance funds similarly established pursuant to P.L.1983, c.372 (C.40A:10-36 et seq.), and P.L.1983, c.108 (C.18A:18B-1 et seq.). The joint insurance funds participating in this program shall jointly file a cash management plan for prior approval by the Commissioner of Banking and Insurance and the Commissioner of Community Affairs and shall comply with all provisions of P.L.1983, c.372 (C.40A:10-36 et seq.) and P.L.1983, c.108 (C.18A:18B-1 et seq.), as appropriate.

40A :10-41. Approval of bylaws and plan of risk management

No joint insurance fund shall begin providing insurance coverage to its member local units until its bylaws and plan of risk management have been approved as hereinafter provided:

a. The commissioners of each joint insurance fund shall concurrently file with the Commissioner of the Department of Insurance for his approval a copy of the fund's bylaws adopted pursuant to section 4. of this act and a copy of the fund's plan of risk management prepared pursuant to section 5. of this act.

b. Upon receipt of any such bylaws and plan of risk management, the Commissioner of Insurance shall immediately notify the Commissioner of the Department of Community Affairs and shall immediately provide that commissioner with a copy of the bylaws and plan of risk management. The Commissioner of the Department of Community Affairs, or if the commissioner shall so designate, the Director of Local Government Services in the Department of Community Affairs, is empowered to approve or disapprove any such bylaws and plans on the basis of whether or not they conform with rules and regulations governing the custody, investment or expenditure of public moneys. Within 25 working days of the receipt of any such bylaws and plan of risk management, the Commissioner of the Department of Community Affairs shall notify the Commissioner of Insurance of his approval or disapproval. As a condition of approval, the Commissioner of the Department of Community Affairs may require such modification of any bylaws or plan of risk management as he may deem necessary to bring them into conformity with the rules and regulations governing the custody, investment or expenditure of public moneys. No bylaws or plan of risk management disapproved by the Commissioner of the Department of Community Affairs, or his designee, shall take effect. If the Commissioner of the Department of Community Affairs, or his designee, fails to approve or disapprove any bylaws or plan of risk management within 25 working days, the bylaws or plan of risk management shall be deemed approved.

c. Within 30 working days of receipt, the Commissioner of Insurance shall either approve or disapprove the bylaws or plan of risk management of any joint insurance fund. If the Commissioner of Insurance shall fail to either approve or disapprove the bylaws or plan of risk management within that 30 working day period, the bylaws or plan shall be deemed approved.

If any bylaws or plan shall be disapproved, the Commissioner of Insurance shall set forth in writing the reasons for disapproval. Upon the receipt of the notice of disapproval, the commissioners of the affected joint insurance fund may request a public hearing. The public hearing shall be convened by the Commissioner of Insurance in a timely manner.

40A :10-42. Provision of insurance coverage after approval

Upon the approval of its bylaws and plan of risk management pursuant to the provisions of section 6 of this act, a joint insurance fund may provide insurance coverage to its member local units by self-insurance, the purchase of commercial insurance or reinsurance, or any combination thereof.

40A :10-43. Commissioners may amend bylaws, approval by Commissioner of Insurance

The commissioners may, from time to time, amend the bylaws and plan of risk management of the fund; provided, however, that no such amendment shall take effect until approved as hereinafter provided.

a. The commissioners shall file with the Commissioner of Insurance for his approval a copy of any amendment to the bylaws of the fund, upon approval by resolution of the governing bodies of three fourths of the member local units, or any amendment to the plan of risk management, upon adoption by the commissioners.

b. Upon receipt of the amendment, the Commissioner of Insurance shall immediately notify the Commissioner of Community Affairs and shall immediately provide that commissioner with a copy of the amendment. The Commissioner of Community Affairs, or by his designation, the Director of the Division of Local Government Services in the Department of Community Affairs, is empowered to approve or disapprove any amendment on the basis of whether or not it conforms with rules and regulations governing the custody, investment or expenditure of public moneys. Within 25 working days of the receipt of the amendment, the Commissioner of Community Affairs, or his designee, shall notify the Commissioner of Insurance of his approval or disapproval. As a condition of approval, the Commissioner of Community Affairs, or his designee, may require a modification of the amendment in order to bring its provisions into conformity with rules and regulations governing the custody, investment or expenditure of public moneys. No amendment disapproved by the Commissioner of Community Affairs, or his designee, shall take effect. If the Commissioner of Community Affairs, or his designee, fails to approve or disapprove any amendment within 25 working days of receipt, the amendment shall be deemed to be approved.

c. Within 30 working days of receipt, the Commissioner of Insurance shall either approve or disapprove any amendment to the bylaws or plan of risk management. If the Commissioner of Insurance shall fail to either approve or disapprove the amendment within that 30 working day period, the amendment shall be deemed approved.

d. If any amendment shall be disapproved, the Commissioner of Insurance shall set forth in writing the reasons for disapproval. Upon the receipt of the notice of disapproval, the commissioners of the affected joint insurance fund may request a public hearing. The public hearing shall be convened by the Commissioner of Insurance in a timely manner.

e. Within 90 days after the effective date of any amendment to the bylaws, a member local unit which did not approve the amendment may withdraw from the fund provided that it shall remain liable for its share of any claim or expense incurred by the fund during its period of membership.

40A :10-44. Suspension, termination, assumption of control or other action by Commissioner; grounds

The Commissioner of Insurance shall have the authority to suspend or terminate the authority of any joint insurance, or to assume control of the insurance fund, or to direct or take any action he may deem necessary, for good cause, to enable a fund to meet its obligations, cover its expected losses or to liquidate, rehabilitate or otherwise modify its affairs. Such action shall be taken by the Commissioner of Insurance in the event of:

a. A failure to comply with the rules and regulations promulgated by the Commissioner of Insurance or with any of the provisions of this act;

b. A failure to comply with a lawful order of the Commissioner of Insurance;

c. A deterioration of the financial condition of the fund to the extent that it causes an adverse effect upon the ability of the joint insurance fund to pay expected losses.

40A :10-45. Filing of agreements or contracts

The Commissioner of Insurance may, in his discretion, require the commissioners of any fund to file copies of any agreements or contracts entered into by the commissioners of the fund, or any other pertinent documents as he may deem necessary.

40A :10-46. Annual audit; submission of copies

The insurance fund commissioners or the executive board thereof, as the case may be, shall cause an annual audit to be conducted by an independent certified public accountant or a registered municipal accountant in accordance with the rules and regulations promulgated by the Commissioner of Insurance pursuant to section 14 of this act. Copies of every audit shall be submitted to the Commissioner of Insurance and the Commissioner of the Department of Community Affairs within 30 working days of its completion.

40A :10-47. Examinations of funds by commissioner of insurance; payment of expenses

The Commissioner of Insurance may conduct such examinations of any joint insurance fund as he deems necessary. The expense of any such examination shall be borne by the affected fund.

40A :10-48. Joint insurance fund not insurance company or insurer and activities not transaction of insurance nor doing insurance business; inapplicability of insurance laws

A joint insurance fund established pursuant to the provisions of this act is not an insurance company or an insurer under the laws of this State, and the authorized activities of the fund do not constitute the transaction of insurance nor doing an insurance business. A fund established pursuant to this act shall not be subject to the provisions of Subtitle 3 of Title 17 of the Revised Statutes.

40A :10-49. Rules and regulations

Within 180 days after the effective date of this act, the Commissioner of Insurance, after consultation with the Commissioner of the Department of Community Affairs, or if that commissioner shall so designate, the Director of the Division of Local Government Services in the Department of Community Affairs, shall promulgate rules and regulations to effectuate the purposes of this act. Such rules and regulations shall include, but not be limited to, the establishment, operation, modification and dissolution of joint insurance funds established pursuant to the provisions of this act.

40A :10-50. "Local unit" includes county vocational school

For the purposes of the provisions of P.L. 1983, c. 372 (C. 40A :10-36 et seq.), "local unit" shall be deemed to include a county vocational school.

40A :10-51. "Local unit" includes county college

For the purpose of the provisions of P.L. 1983, c. 372 (C. 40A :10-36 et seq.), "local unit" shall be deemed to include a county college.

40A :10-52 Joint insurance for municipality, school district.

The governing body of any municipality and the board of education of any school district, provided that the district is not part of a limited purpose regional school district, an all-purpose regional school district or a consolidated school district, may by ordinance or resolution, as the case may be, adopted by a majority of the full membership of the governing body and by a majority of the full membership of the board, agree to join together for the purpose of insuring pursuant to the provisions of: a. Article 1 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-1 et seq.); b. Article 3 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-6 et seq.); c. Article 4 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-12 et seq.); or d. P.L.1983, c.372 (C.40A:10-36 et seq.).

40A :10-53 Joint insurance for municipality, all-purpose regional, consolidated school district.

In the case of an all-purpose regional school district or a consolidated school district, the governing body of any municipality and the board of education of the regional or consolidated school district may by resolution adopted by a majority of the full membership of the governing body and a majority of the full membership of the board, agree to join together for the purpose of insuring pursuant to the provisions of: a. Article 1 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-1 et seq.); b. Article 3 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-6 et seq.); c. Article 4 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-12 et seq.); or d. P.L.1983, c.372 (C.40A:10-36 et seq.).

40A :10-54 Joint insurance for municipality, limited purpose regional school district.

In the case of a limited purpose regional school district, the governing body of any municipality and the board of education of the regional district may by ordinance or resolution, as the case may be, adopted by a majority of the full membership of the governing body and a majority of the full membership of the board, agree to join together for the purpose of insuring pursuant to the provisions of: a. Article 1 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-1 et seq.); b. Article 3 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-6 et seq.); c. Article 4 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-12 et seq.); or d. P.L.1983, c.372 (C.40A:10-36 et seq.).

40A :10-55 Additional joint insurance for municipality, limited purpose regional school district, other district.

In the case of a limited purpose regional school district, in addition to any contract entered into by a municipality pursuant to section 3 of this act, the governing body of any municipality and the board of education of any school district may, in accordance with section 1 of this act, agree to join together for the purpose of insuring pursuant to the provisions of: a. Article 1 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-1 et seq.); b. Article 3 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-6 et seq.); c. Article 4 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-12 et seq.); or d. P.L.1983, c.372 (C.40A:10-36 et seq.).

40A :10-56 Joint insurance for municipality, county vocational school district.

In the case of a county vocational school district, the governing body of any municipality and the board of education of the county vocational school district may by ordinance or resolution, as the case may be, adopted by a majority of the full membership of the governing body and a majority of the full membership of the board, agree to join together for the purpose of insuring pursuant to the provisions of: a. Article 1 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-1 et seq.); b. Article 3 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-6 et seq.); or c. Article 4 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-12 et seq.).

40A :10-57 Additional joint insurance for municipality, county vocational school district, other district.

In the case of a county vocational school district, in addition to any contract entered into by a municipality pursuant to section 5 of this act, the governing body of any municipality and any board of education may, in accordance with section 1 of this act, agree to join together for the purpose of insuring pursuant to the provisions of: a. Article 1 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-1 et seq.); b. Article 3 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-6 et seq.); c. Article 4 of chapter 10 of Title 40A of the New Jersey Statutes (N.J.S.40A:10-12 et seq.); or d. P.L.1983, c.372 (C.40A:10-36 et seq.).

40A :10-58. Contracts for insurance

Any contract for insurance to be entered into in accordance with this act shall be established pursuant to sections 10 and 11 of P.L.1971, c.198 (C.40A:11-10 and 40A :11-11).