City of Grand Island

Tuesday, November 01, 2011

Study Session Packet

City Council:

Larry Carney
Linna Dee Donaldson
Scott Dugan
Randy Gard
John Gericke
Peg Gilbert
Chuck Haase
Mitchell Nickerson
Bob Niemann
Kirk Ramsey

Mayor:

Jay Vavricek

City Administrator:

Mary Lou Brown

City Clerk:

RaNae Edwards

7:00:00 PM
Council Chambers - City Hall
100 East First Street

Call to Order

This is an open meeting of the Grand Island City Council. The City of Grand Island abides by the Open Meetings Act in conducting business. A copy of the Open Meetings Act is displayed in the back of this room as required by state law.

The City Council may vote to go into Closed Session on any agenda item as allowed by state law.

Invocation

Pledge of Allegiance

Roll Call

A - SUBMITTAL OF REQUESTS FOR FUTURE ITEMS

Individuals who have appropriate items for City Council consideration should complete the Request for Future Agenda Items form located at the Information Booth. If the issue can be handled administratively without Council action, notification will be provided. If the item is scheduled for a meeting or study session, notification of the date will be given.

B - RESERVE TIME TO SPEAK ON AGENDA ITEMS

This is an opportunity for individuals wishing to provide input on any of tonight's agenda items to reserve time to speak. Please come forward, state your name and address, and the Agenda topic on which you will be speaking.

MAYOR COMMUNICATION

This is an opportunity for the Mayor to comment on current events, activities, and issues of interest to the community.

City of Grand Island

Tuesday, November 01, 2011
Study Session

Item -1

Discussion Concerning Closed Sessions

Staff Contact: Mary Lou Brown

Council Agenda Memo

From: Mary Lou Brown, City Administrator

Meeting: November 1, 2011

Subject: Nebraska Open Meeting Act

Item #'s: 1

Presenter(s): Lynn Rex, Executive Director of League of Nebraska Municipalities

Background

Public meetings held by the City of Grand Island are governed by the Nebraska Open Meeting Act, including closed sessions. State Statutes 84-1408 through 84-1414 are the laws related to public meetings. The City has gone into closed session several times this year due to the high number of contract negotiations. This has generated many questions and concerns regarding the process and rules applicable to closed sessions.

Discussion

Lynn Rex, Executive Director of the League of Nebraska Municipalities, has expertise in municipal law and will be reviewing Nebraska's Open Meetings Act with the City Council. Rex will be presenting an overview of the appropriate State Statutes, and outline the opinions of the Nebraska Attorney General's Office, with a focus on closed session.

Conclusion

This item is presented to the City Council in a Study Session to allow for any questions to be answered and to create a greater understanding of the issue at hand.

OPEN MEETINGS ACT - 2011

84-1408. Declaration of intent; meetings open to public.

It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

Source: Laws 1975, LB 325, § 1; Laws 1996, LB 900, § 1071; Laws 2004, LB 821, § 35.

Annotations

Nebraska's public meetings laws do not apply to school board deliberations pertaining solely to disputed adjudicative facts. McQuinn v. Douglas Cty. Sch. Dist. No. 66, 259 Neb. 720, 612 N.W.2d 198 (2000).

The primary purpose of the public meetings law is to ensure that public policy is formulated at open meetings. Marks v. Judicial Nominating Comm., 236 Neb. 429, 461 N.W.2d 551 (1990).

The public meetings law is broadly interpreted and liberally construed to obtain the objective of openness in favor of the public, and provisions permitting closed sessions must be narrowly and strictly construed. Grein v. Board of Education of Fremont, 216 Neb. 158, 343 N.W.2d 718 (1984).

84-1409. Terms, defined.

For purposes of the Open Meetings Act, unless the context otherwise requires:

(1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska, (ii) governing bodies of all agencies, created by the Constitution of Nebraska, statute, or otherwise pursuant to law, of the executive department of the State of Nebraska, (iii) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created by the Constitution of Nebraska, statute, or otherwise pursuant to law, (iv) all study or advisory committees of the executive department of the State of Nebraska whether having continuing existence or appointed as special committees with limited existence, (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision, and (vi) instrumentalities exercising essentially public functions; and

(b) Public body does not include (i) subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body, except that all meetings of any subcommittee established under section 81-15,175 are subject to the Open Meetings Act, and (ii) entities conducting judicial proceedings unless a court or other judicial body is exercising rulemaking authority, deliberating, or deciding upon the issuance of administrative orders;

(2) Meeting means all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body; and

(3) Videoconferencing means conducting a meeting involving participants at two or more locations through the use of audio-video equipment which allows participants at each location to hear and see each meeting participant at each other location, including public input. Interaction between meeting participants shall be possible at all meeting locations.

Source: Laws 1975, LB 325, § 2; Laws 1983, LB 43, § 1; Laws 1989, LB 429, § 42; Laws 1989, LB 311, § 14; Laws 1992, LB 1019, § 124; Laws 1993, LB 635, § 1; Laws 1996, LB 1044, § 978; Laws 1997, LB 798, § 37; Laws 2004, LB

821, § 36; Laws 2007, LB296, § 810; Laws 2011, LB366, § 2.
Effective Date: August 27, 2011

Annotations

A township is a political subdivision, and as such, a township board is subject to the provisions of the public meetings laws. Steenblock v. Elkhorn Township Bd., 245 Neb. 722, 515 N.W.2d 128 (1994).

A county agricultural society is a public body to which the provisions of the Nebraska public meetings law are applicable. Nixon v. Madison Co. Ag. Soc'y, 217 Neb. 37, 348 N.W.2d 119 (1984).

Failure by a public governing body, as defined under section 84-1409, R.R.S.1943, to take and record a roll call vote on an action, as required by section 84-1413(2), R.S.Supp.,1980, grants any citizen the right to sue for the purpose of having the action declared void. In this case such failure could not be later corrected by a nunc pro tunc order because there was no showing that a roll call vote on the disputed action was actually taken, and even if it was the record showed it was not recorded until over a year later. Sections 23-1301, R.R.S.1943, and 23-1302, R.R.S.1943, make it the duty of the county clerk to record proceedings of the board of county commissioners. State ex rel. Schuler v. Dunbar, 208 Neb. 69, 302 N.W.2d 674 (1981).

The meeting at issue in this case was a "meeting" within the parameters of subsection (2) of this section because it involved the discussion of public business, the formation of tentative policy, or the taking of any action of the public power district. Hansmeyer v. Nebraska Pub. Power Dist., 6 Neb. App. 889, 578 N.W.2d 476 (1998).

Informational sessions in which the governmental body hears reports are briefings. Johnson v. Nebraska Environmental Control Council, 2 Neb. App. 263, 509 N.W.2d 21 (1993).

84-1410. Closed session; when; purpose; reasons listed; procedure; right to challenge; prohibited acts; chance meetings, conventions, or workshops.

(1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:

(a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;

(b) Discussion regarding deployment of security personnel or devices;

(c) Investigative proceedings regarding allegations of criminal misconduct; or

(d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.
Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

(e) For the Community Trust created under section 81-1801.02, discussion regarding the amounts to be paid to individuals who have suffered from a tragedy of violence or natural disaster.

(2) The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. The meeting shall be reconvened in open session before any formal action may be taken. For purposes of this

section, formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy but shall not include negotiating guidance given by members of the public body to legal counsel or other negotiators in closed sessions authorized under subdivision (1)(a) of this section.

(3) Any member of any public body shall have the right to challenge the continuation of a closed session if the member determines that the session has exceeded the reason stated in the original motion to hold a closed session or if the member contends that the closed session is neither clearly necessary for (a) the protection of the public interest or (b) the prevention of needless injury to the reputation of an individual. Such challenge shall be overruled only by a majority vote of the members of the public body. Such challenge and its disposition shall be recorded in the minutes.

(4) Nothing in this section shall be construed to require that any meeting be closed to the public. No person or public body shall fail to invite a portion of its members to a meeting, and no public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act. No closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the act.

(5) The act does not apply to chance meetings or to attendance at or travel to conventions or workshops of members of a public body at which there is no meeting of the body then intentionally convened, if there is no vote or other action taken regarding any matter over which the public body has supervision, control, jurisdiction, or advisory power.

Source: Laws 1975, LB 325, § 3; Laws 1983, LB 43, § 2; Laws 1985, LB 117, § 1; Laws 1992, LB 1019, § 125; Laws 1994, LB 621, § 1; Laws 1996, LB 900, § 1072; Laws 2004, LB 821, § 37; Laws 2004, LB 1179, § 1; Laws 2006, LB 898, § 1; Laws 2011, LB390, § 29.
Operative Date: May 27, 2011

Annotations

If a person present at a meeting observes a public meetings law violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date. Wasikowski v. Nebraska Quality Jobs Bd., 264 Neb. 403, 648 N.W.2d 756 (2002).

The public interest mentioned in this section is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. Grein v. Board of Education, 216 Neb. 158, 343 N.W.2d 718 (1984).

Hearing in closed executive session was contrary to this section since there was no showing of necessity or reason under subdivision (1)(a), (b), or (c), but did not result in reversal of board decision. Simonds v. Board of Examiners, 213 Neb. 259, 329 N.W.2d 92 (1983).

Negotiations for the purchase of land need not be conducted at an open meeting but the deliberations of a city council as to whether an offer to purchase real estate should be made should take place in an open meeting. Pokorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2d 281 (1979).

Public meeting law was not violated where the Board of Regents of the University of Nebraska voted to hold a closed session to consider the university president's resignation, and also discussed the appointment of an interim president during such session. Meyer v. Board of Regents, 1 Neb. App. 893, 510 N.W.2d 450 (1993).

84-1411. Meetings of public body; notice; contents; when available; right to modify; duties concerning notice; videoconferencing or telephone conferencing authorized; emergency meeting without notice; appearance before public body.

(1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such

notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

(2) A meeting of a state agency, state board, state commission, state council, or state committee, of an advisory committee of any such state entity, of an organization created under the Interlocal Cooperation Act, the Joint Public Agency Act, or the Municipal Cooperative Financing Act, of the governing body of a public power district having a chartered territory of more than fifty counties in this state, of a board of an educational service unit, or of the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act may be held by means of videoconferencing or, in the case of the Judicial Resources Commission in those cases specified in section 24-1204, by telephone conference, if:

(a) Reasonable advance publicized notice is given;

(b) Reasonable arrangements are made to accommodate the public's right to attend, hear, and speak at the meeting, including seating, recordation by audio or visual recording devices, and a reasonable opportunity for input such as public comment or questions to at least the same extent as would be provided if videoconferencing or telephone conferencing was not used;

(c) At least one copy of all documents being considered is available to the public at each site of the videoconference or telephone conference;

(d) At least one member of the state entity, advisory committee, board, or governing body is present at each site of the videoconference or telephone conference; and

(e) No more than one-half of the state entity's, advisory committee's, board's, or governing body's meetings in a calendar year are held by videoconference or telephone conference. Videoconferencing, telephone conferencing, or conferencing by other electronic communication shall not be used to circumvent any of the public government purposes established in the Open Meetings Act.

(3) A meeting of a board of an educational service unit, of the governing body of an entity formed under the Interlocal Cooperation Act, the Joint Public Agency Act, or the Municipal Cooperative Financing Act, or of the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act may be held by telephone conference call if:

(a) The territory represented by the educational service unit or member public agencies of the entity or pool covers more than one county;

(b) Reasonable advance publicized notice is given which identifies each telephone conference location at which an educational service unit board member or a member of the entity's or pool's governing body will be present;

(c) All telephone conference meeting sites identified in the notice are located within public buildings used by members of the educational service unit board or entity or pool or at a place which will accommodate the anticipated audience;

(d) Reasonable arrangements are made to accommodate the public's right to attend, hear, and speak at the meeting, including seating, recordation by audio recording devices, and a reasonable opportunity for input such as public comment or questions to at least the same extent as would be provided if a telephone conference call was not used;

(e) At least one copy of all documents being considered is available to the public at each site of the telephone conference call;

(f) At least one member of the educational service unit board or governing body of the entity or pool is present at each site of the telephone conference call identified in the public notice;

(g) The telephone conference call lasts no more than one hour; and

(h) No more than one-half of the board's, entity's, or pool's meetings in a calendar year are held by telephone conference call, except that a governing body of a risk management pool that meets at least quarterly and the advisory committees of the governing body may each hold more than one-half of its meetings by telephone conference call if the governing body's quarterly meetings are not held by telephone conference call or videoconferencing.

Nothing in this subsection shall prevent the participation of consultants, members of the press, and other nonmembers of the governing body at sites not identified in the public notice. Telephone conference calls, emails, faxes, or other electronic communication shall not be used to circumvent any of the public government purposes established in the Open Meetings Act.

(4) The secretary or other designee of each public body shall maintain a list of the news media requesting notification of meetings and shall make reasonable efforts to provide advance notification to them of the time and place of each meeting and the subjects to be discussed at that meeting.

(5) When it is necessary to hold an emergency meeting without reasonable advance public notice, the nature of the emergency shall be stated in the minutes and any formal action taken in such meeting shall pertain only to the emergency. Such emergency meetings may be held by means of electronic or telecommunication equipment. The provisions of subsection (4) of this section shall be complied with in conducting emergency meetings. Complete minutes of such emergency meetings specifying the nature of the emergency and any formal action taken at the meeting shall be made available to the public by no later than the end of the next regular business day.

(6) A public body may allow a member of the public or any other witness other than a member of the public body to appear before the public body by means of video or telecommunications equipment.

Source: Laws 1975, LB 325, § 4; Laws 1983, LB 43, § 3; Laws 1987, LB 663, § 25; Laws 1993, LB 635, § 2; Laws 1996, LB 469, § 6; Laws 1996, LB 1161, § 1; Laws 1999, LB 47, § 2; Laws 1999, LB 87, § 100; Laws 1999, LB 461, § 1; Laws 2000, LB 968, § 85; Laws 2004, LB 821, § 38; Laws 2004, LB 1179, § 2; Laws 2006, LB 898, § 2; Laws 2007, LB199, § 9; Laws 2009, LB361, § 2. August 30, 2009

Cross Reference

Intergovernmental Risk Management Act, see section 44-4301.
Interlocal Cooperation Act, see section 13-801.
Joint Public Agency Act, see section 13-2501.
Municipal Cooperative Financing Act, see section 18-2401.

Annotations

An emergency is "(a)ny event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition." Steenblock v. Elkhorn Township Bd., 245 Neb. 722, 515 N.W.2d 128 (1994).

An agenda which gives reasonable notice of the matters to be considered at a meeting of a city council complies with the requirements of this section. Pokorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2d 281 (1979).

When notice is required, a notice of a special meeting of a city council posted in three public places at 10:00 p.m. on the day preceding the meeting is not reasonable advance publicized notice of a meeting as is required by this section. Pokorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2d 281 (1979).Teacher waived right to object to lack of public notice in board of education employment hearing by voluntary participation in the hearing without objection. Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N.W.2d 335 (1976).

An agenda notice which merely stated "work order reports" was an inadequate notice under this section because it did not give interested persons knowledge that plans for a 345 kv transmission line through the district was going to be discussed and voted upon at the meeting. Inadequate agenda notice under this section meant there was a substantial violation of the public meeting laws; however, later actions by the board of directors cured the defects in notice, and such actions were in substantial compliance with the statute. Hansmeyer v. Nebraska Pub. Power Dist., 6 Neb. App. 889, 578 N.W.2d 476 (1998).

84-1412. Meetings of public body; rights of public; public body; powers and duties.

(1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies, and all or any part of a meeting of a public body, except for closed sessions called pursuant to section 84-1410, may be videotaped, televised, photographed, broadcast, or recorded by any person in attendance by means of a tape recorder, camera, video equipment, or any other means of pictorial or sonic reproduction or in writing.

(2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings. A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.

(3) No public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda. The body may require any member of the public desiring to address the body to identify himself or herself.

(4) No public body shall, for the purpose of circumventing the Open Meetings Act, hold a meeting in a place known by the body to be too small to accommodate the anticipated audience.

(5) No public body shall be deemed in violation of this section if it holds its meeting in its traditional meeting place which is located in this state.

(6) No public body shall be deemed in violation of this section if it holds a meeting outside of this state if, but only if:

(a) A member entity of the public body is located outside of this state and the meeting is in that member's jurisdiction;

(b) All out-of-state locations identified in the notice are located within public buildings used by members of the entity or at a place which will accommodate the anticipated audience;

(c) Reasonable arrangements are made to accommodate the public's right to attend, hear, and speak at the meeting, including making a telephone conference call available at an instate location to members, the public, or the press, if requested twenty-four hours in advance;

(d) No more than twenty-five percent of the public body's meetings in a calendar year are held out-of-state;

(e) Out-of-state meetings are not used to circumvent any of the public government purposes established in the Open Meetings Act;

(f) Reasonable arrangements are made to provide viewing at other instate locations for a videoconference meeting if requested fourteen days in advance and if economically and reasonably available in the area; and

(g) The public body publishes notice of the out-of-state meeting at least twenty-one days before the date of the meeting in a legal newspaper of statewide circulation.

(7) The public body shall, upon request, make a reasonable effort to accommodate the public's right to hear the discussion and testimony presented at the meeting.

(8) Public bodies shall make available at the meeting or the instate location for a telephone conference call or videoconference, for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting. Public bodies shall make available at least one current copy of the Open Meetings Act posted in the meeting room at a location accessible to members of the public. At the beginning of the meeting, the public shall be informed about the location of the posted information.

Source: Laws 1975, LB 325, § 5; Laws 1983, LB 43, § 4;Laws 1985, LB 117, § 2; Laws 1987, LB 324, § 5;Laws 1996, LB 900, § 1073; Laws 2001, LB 250, § 2;Laws 2004, LB 821, § 39; Laws 2006, LB 898, § 3; Laws 2008, LB962, § 1. July 18, 2008

Annotations

To preserve an objection that a public body failed to make documents available at a public meeting as required by subsection (8) of this section, a person who attends a public meeting must not only object to the violation, but must make that objection to the public body or to a member of the public body. Stoetzel & Sons v. City of Hastings, 265 Neb. 637, 658 N.W.2d 636 (2003).

84-1413. Meetings; minutes; roll call vote; secret ballot; when.

(1) Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.

(2) Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting. The requirements of a roll call or viva voce vote shall be satisfied by a municipality, a county, a learning community, a joint entity created pursuant to the Interlocal Cooperation Act, a joint public agency created pursuant to the Joint Public Agency Act, or an agency formed under the Municipal Cooperative Financing Act which utilizes an electronic voting device which allows the yeas and nays of each member of such city council, village board, county board, or governing body to be readily seen by the public.

(3) The vote to elect leadership within a public body may be taken by secret ballot, but the total number of votes for each candidate shall be recorded in the minutes.

(4) The minutes of all meetings and evidence and documentation received or disclosed in open session shall be public records and open to public inspection during normal business hours.

(5) Minutes shall be written and available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier, except that cities of the second class and villages may have an additional ten working days if the employee responsible for writing the minutes is absent due to a serious illness or emergency.

Source: Laws 1975, LB 325, § 6; Laws 1978, LB 609, § 3; Laws 1979, LB 86, § 9; Laws 1987, LB 663, § 26; Laws 2005,

LB 501, § 1; Laws 2009, LB361, § 3. August 30, 2009

Cross Reference

Interlocal Cooperation Act, see section 13-801.
Joint Public Agency Act, see section 13-2501.
Municipal Cooperative Financing Act, see section 18-2401.

Annotations

If a person present at a meeting observes and fails to object to an alleged public meetings laws violation in the form of a failure to conduct rollcall votes before taking actions on questions or motions pending, that person waives his or her right to object at a later date. Hauser v. Nebraska Police Stds. Adv. Council, 264 Neb. 944, 653 N.W.2d 240 (2002).

Subsection (2) of this section does not require the record to state that the vote was by roll call, but requires only that the record show if and how each member voted. Neither does the statute set a time limit for recording the results of a vote, after which no corrections of the record can be made. If no intervening rights of third persons have arisen, a board of county commissioners has power to correct the record of the proceedings had at a previous meeting so as to make them speak the truth, particularly where the correction supplies some omitted fact or action and is done not to contradict or change the original record but to have the record show that a certain action was taken or thing done, which the original record fails to show. State ex rel. Schuler v. Dunbar, 214 Neb. 85, 333 N.W.2d 652 (1983).

Failure by a public governing body, as defined under section 84-1409, R.R.S.1943, to take and record a roll call vote on an action, as required by section 84-1413(2), R.S.Supp.,1980, grants any citizen the right to sue for the purpose of having the action declared void. In this case such failure could not be later corrected by a nunc pro tunc order because there was no showing that a roll call vote on the disputed action was actually taken, and even if it was the record showed it was not recorded until over a year later. Sections 23-1301, R.R.S.1943, and 23-1302, R.R.S.1943, make it the duty of the county clerk to record proceedings of the board of county commissioners. State ex rel. Schuler v. Dunbar, 208 Neb. 69, 302 N.W.2d 674 (1981).

84-1414. Unlawful action by public body; declared void or voidable by district court; when; duty to enforce open meeting laws; citizen's suit; procedure; violations; penalties.

(1) Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of the Open Meetings Act shall be declared void by the district court if the suit is commenced within one hundred twenty days of the meeting of the public body at which the alleged violation occurred. Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in substantial violation of the Open Meetings Act shall be voidable by the district court if the suit is commenced more than one hundred twenty days after but within one year of the meeting of the public body in which the alleged violation occurred. A suit to void any final action shall be commenced within one year of the action.

(2) The Attorney General and the county attorney of the county in which the public body ordinarily meets shall enforce the Open Meetings Act.

(3) Any citizen of this state may commence a suit in the district court of the county in which the public body ordinarily meets or in which the plaintiff resides for the purpose of requiring compliance with or preventing violations of the Open Meetings Act, for the purpose of declaring an action of a public body void, or for the purpose of determining the applicability of the act to discussions or decisions of the public body. It shall not be a defense that the citizen attended the meeting and failed to object at such time. The court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under this section.

(4) Any member of a public body who knowingly violates or conspires to violate or who attends or remains at a meeting knowing that the public body is in violation of any provision of the Open Meetings Act shall be guilty of a Class IV misdemeanor for a first offense and a Class III misdemeanor for a second or subsequent offense.

Source: Laws 1975, LB 325, § 9; Laws 1977, LB 39, § 318; Laws 1983, LB 43, § 5; Laws 1992, LB 1019, § 126; Laws 1994, LB 621, § 2; Laws 1996, LB 900, § 1074; Laws 2004, LB 821, § 40; Laws 2006, LB 898, § 4.

Annotations

If a person present at a meeting observes a public meetings law violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date. Wasikowski v. Nebraska Quality Jobs Bd., 264 Neb. 403, 648 N.W.2d 756 (2002).

Under the Public Meetings Act, a county lacks capacity to maintain an action to declare its official conduct "void" for noncompliance with the act. County of York v. Johnson, 230 Neb. 403, 432 N.W.2d 215 (1988).When a petitioner under this section is successful in the district court, that court may allow attorney fees. Tracy Corp. II v. Nebraska Pub. Serv. Comm., 218 Neb. 900, 360 N.W.2d 485 (1984).

Informal discussions between the Tax Commissioner and the State Board of Equalization in which instructions were clarified, with such clarification leading to the amendment of hearing notices, did not constitute a public meeting subject to the provisions of this section. Box Butte County v. State Board of Equalization and Assessment, 206 Neb. 696, 295 N.W.2d 670 (1980).

The right to collaterally attack an order made in contravention of the Public Meeting Act must occur within a period of one year as is specifically provided by this section. Witt v. School District No. 70, 202 Neb. 63, 273 N.W.2d 669 (1979).Statutory change, requiring "publicized notice" for board of education employment hearings, occurring between dates meeting scheduled and conducted, held not to void proceedings. Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N.W.2d 335 (1976).

Actions by the board of directors were merely voidable under this section, and not void. Pursuant to subsection (3) of this section, the plaintiffs were awarded partial attorney fees because they were successful in having the court declare that the board of directors was in substantial violation of the statute, even though the plaintiffs did not get the relief requested of having the board's actions declared void. Hansmeyer v. Nebraska Pub. Power Dist., 6 Neb. App. 889, 578 N.W.2d 476 (1998).

CLOSED SESSION

1. (Council member) I move that we go into Closed Session for the purpose of discussing _____.

Purpose of Closed Sessions are for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. These sessions may held for, but not limited to, such reasons as:

a.) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidence by communication of a claim or threat of litigation to or by the public body;
b.) Discussion regarding deployment of security personnel or devices
c.) Investigative proceedings regarding allegations of criminal misconduct
d.) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.

2. (Council member) I second the motion.

3. (Mayor) A motion has been made and seconded to go into Closed Session for the purpose of discussing _____.

4. (Mayor) Is there any discussion?

5. (Mayor) The pending motion is to go into Closed Session for the purpose of discussing _____. Roll call vote.

6. (Clerk) Motion adopted/failed.

7. (Mayor) A motion to go into Closed Session for the purpose of discussing _____ has been adopted/denied.

From the City of Grand Island

Nebraska Open Meetings Act – Nebraska Attorney General

The Nebraska Open Meetings Act guarantees that every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies. The information below details NEB. REV. STAT. §§ 84-1407 TO 84-1414 (2008, Supp 2009)

*** BASIC PROVISION**
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*** PUBLIC MEETINGS BY VIDEOCONFERENCING AND TELEPHONE CONFERENCE CALL**
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*** CLOSED SESSIONS OF A PUBLIC BODY**
*** CIRCUMVENTION OF THE OPEN MEETINGS ACT**
*** ACTIONS FOR ENFORCEMENT**
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BASIC PROVISION

The basic statement of our state policy on public meetings is found at Neb. Rev. Stat. § 84-1408. That statute provides, "[i]t is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret. Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of the State of Nebraska, federal statutes, and the Open Meetings Act."

History. Section 84-1408 was passed as a part of LB 325 in 1975. That bill repealed previously existing public meetings provisions and substituted new provisions which were intended to preserve the features of the previous law and strengthen and expand their authority. Government Committee Statement on LB 325, 84th Nebraska Legislature, First Session (1975). LB 325 was passed to ensure that all meetings of public bodies would be open to the public, except when protection of the public interest clearly called for a closed session concerning specific matters. Id. 2004 Neb. Laws LB 821, § 34 formally established the name of §§ 84-1407 through 84-1414 as the "Open Meetings Act."

Purpose. The Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); Grein v. *Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). Their purpose is to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. *Dossett v. First State Bank, Loomis, NE*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990); Pokorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2d 281 (1979). In Nebraska, the formation of public policy is public business, which may not be conducted in secret. *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993).

Construction. The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *State ex rel. Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148, 728 N.W.2d 275 (2007); *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007); *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (Neb. Ct. App. 2002); *Rauert v. School District I-R of Hall County*, 251 Neb. 135, 555 N.W.2d 763 (1996); *Grein*, supra. The beneficiaries of the openness sought by the Open Meetings Act include citizens, members of the general public, and reporters or other representatives of the news media. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007).

Exceptions. Section 84-1408 requires open meetings except "as otherwise provided by the Constitution of the State of Nebraska, federal statutes, and the Open Meetings Act." The Attorney General has concluded that the Nebraska Legislature is not covered under the open meetings statutes because the Nebraska Constitution separately provides for public access to that body. Op. Att'y Gen. No. 120 (July 25, 1985).

Subsequent legislative limitations. The Legislature holds the power to decide the scope of citizen access to governmental meetings. As a result, the Legislature has the right to limit access to public meetings and the effect of the Open Meetings Act through later statutory provisions which provide that certain information in the possession of government should remain confidential without exception or limitation. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002).

PUBLIC BODIES WHICH ARE COVERED

Under § 84-1409(1), public bodies covered by the public meetings statutes include: (1) governing bodies of all political subdivisions of the State, (2) governing bodies of all agencies of the executive department of state government created by law, (3) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created pursuant to law, (4) all study or advisory committees of the executive department of the state whether of continuing or limited existence, (5) advisory committees of the governing bodies of political subdivisions, of the governing bodies of agencies of the executive branch of state government, or of independent boards, commissions, etc., and (6) "instrumentalities exercising essentially public functions."

1. **History**. The initial portion of § 84-1409(1) defining public bodies was originally part of LB 325 passed in 1975. It has been amended several times to add additional entities to the list of bodies covered, and the Certificate of Need Review Committee was removed in 1997. See 1997 Neb. Laws LB 798; 1989 Neb. Laws LB 429 and LB 311; 1983 Neb. Laws LB 43. The language concerning "instrumentalities exercising essentially public functions" was added in 1989 to reach entities such as the Nebraska Investment Finance Authority. Floor Debate on LB 311, 91st Nebraska Legislature, First Session, May 9, 1989, at 6039, 6040.

2. **Cases and Opinions**. A number of cases and opinions of the Attorney General deal with various aspects of the definitions of public body found in § 84-1409(1).

a. "Political subdivision" is not defined within the public meetings statutes. However, the Attorney General has indicated that generally the term denotes any subdivision of a state which has as its purpose carrying out functions of the state which are inherent necessities of

government and which have always been regarded as such by the public. 1979-80 Rep. Att'y Gen. 140 (Opinion No. 98, dated April 25, 1979). Presumably, this term includes cities, counties, villages, etc., and their governing boards are covered by the open meetings statutes.

b. In *Nixon v. Madison County Agricultural Society*, 217 Neb. 37, 348 N.W.2d 119 (1984), the Court held that a county agricultural society, organized under the Nebraska statutes, was subject to the provisions of the open meetings law. The Court noted that, although the society at issue resembled a private corporation in some respects, the fact that it had the right to receive support from the public revenue gave it a public character. The agricultural society apparently was an "independent board . . . created by constitution, statute, or otherwise pursuant to law." Based upon the Nixon case, the Attorney General concluded that county extension services which have the right to receive support from public revenues are subject to the open meetings law. Op. Att'y Gen. No. 219 (July 24, 1984). Also based upon the Nixon case, the Attorney General has indicated that county agricultural societies are subject to the open meetings statutes. Op. Att'y Gen. No. 91007 (January 28, 1991). In addition, Neb. Rev. Stat. § 2-238 requires that result.

c. In *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990), the Court held that the open meetings statutes do not apply to the activities of a judicial nominating commission which is meeting to select nominees for judicial vacancies. Such a nomination procedure does not involve the formulation of public policy subject to the act.

d. The Nebraska Court of Appeals, in *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993), held that the open meetings statutes apply to the governing bodies of all agencies of the executive branch of government, including the Nebraska Environmental Control Council.

e. In *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007), the Nebraska Court of Appeals concluded that the electors of a Nebraska township, when assembled at the township's annual meeting, constitute a governing body of the township which is subject to the Open Meetings Act and its provisions concerning notice and preparation of an agenda.

f. The Nebraska Court of Appeals indicated in *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) that a county board of equalization is a public body as defined in § 84-1409. The court also held in that case that when two boards are made up of the same members, the duties and functions of the two boards, rather than their membership, determine if they are the same or separate and distinct bodies.

g. Committees of faculty, administration and students created by the Board of Regents of the University of Nebraska to advise the Chancellor of the University in his administrative/management function with respect to budget cuts were part of the management structure of the University and not public bodies subject to the open meetings statutes. Op. Att'y Gen. No. 92020 (February 12, 1992).

h. In Op. Att'y Gen. No. 11 (January 20, 1983), the Attorney General indicated that the Environmental Control Council is a public body subject to the open meetings law. On the other hand, the Department of Environmental Control is not. Section 84-1409 applies to governing bodies of state agencies, not the agencies themselves.

i. An employee grievance appeal hearing conducted by a hearing officer is not a meeting of a public body since the word "body" is commonly understood to refer to a group or number of persons, and thus does not include an individual conducting a hearing. Op. Att'y Gen. No. 210 (May 16, 1984).

j. In 1989, the Attorney General indicated that the Central Low-Level Radioactive Waste Compact Commission was not subject to the Nebraska open meetings law because it was a multi-state body which was not created by constitution or statute and which was not a governing body of a Nebraska state agency. Op. Att'y Gen. No. 89008 (February 14, 1989). However, Neb. Rev. Stat. § 71-3521 (the Waste Compact agreement itself) provided that meetings of the Compact Commission must be open to the public with reasonable advance publicized notice, and that the Compact Commission must adopt by-laws consistent in scope and principle with the open meetings law of the host state. Section 71-3521 was repealed by 1999 Neb. Laws LB 530, § 2, and Nebraska withdrew from the Central Low-Level Radioactive Waste Compact.

k. A county welfare board is subject to the open meetings law as an independent board created by statute. 1979-80 Rep. Att'y Gen. 351 (Opinion No. 244, dated March 4, 1980).

l. In Op. Att'y Gen. No. 95014 (February 22, 1995), the Attorney General indicated that the Mayor's Citizen Review Board, appointed by the Mayor of Omaha to advise the Mayor with respect to alleged misconduct of police officers, was not subject to the open meetings statutes because it did not fall under the definition found in § 84-1409(1), and because the board was essentially an administrative body which was part of the management structure of the City.

m. In Op. Att'y Gen. No. 93065 (July 27, 1993), the Attorney General concluded that parole reviews under Neb. Rev. Stat. § 83-1,111 may be closed, and are not subject to open meetings requirements.

n. The Excellence in Education Council created to make recommendations to the Governor regarding selection of projects for Education Innovation grants is a public body which is subject to the open meetings statutes, and its decisions concerning specific recommendations must be done in open session. Op. Att'y Gen. No. 94092 (November 22, 1994).

o. The Division of Rehabilitation Services of the State Department of Education is a public body, and its business must be conducted in compliance with the provisions of the open meetings statutes. Op. Att'y Gen. No. 93091 (October 22, 1993).

p. The Quality Jobs Board created under the Quality Jobs Act, Neb. Rev. Stat. §§ 77-4901 through 77-4935 is a public body subject to the Open Meetings Act. Op. Att'y Gen. No. 96071 (October 28, 1996).

q. A County Hospital Authority formed under the Hospital Authorities Act, Neb. Rev. Stat. §§ 23-3579 through 23-35,120 is a public body which is subject to the Open Meetings Act. Op. Att'y Gen. No. 97012 (February 14, 1997).

r. The Nebraska State Board of Agriculture (the State Fair Board) is not a public body which is subject to the Open Meetings Act, primarily because it has no statutory right to public revenue and also because of case law which indicates that it is a private corporation. Op. Att'y Gen. No. 01038 (November 27, 2001).

s. A county clerk, county attorney and county treasurer acting as a group under § 32-567 (3) to make an appointment to fill a vacancy on a county board constitute a public body which is subject to the Open Meetings Act. Op. Att'y Gen. No. 97050 (September 18, 1997).

t. The Attorney General has indicated informally that the Nebraska Board of Pardons and the Board of Inquiry and Review created under Neb. Rev. Stat. §§ 80-317 through 80-319 to receive and act upon applications submitted for membership in Nebraska Veterans Homes are subject to the state's open meetings statutes.

3. **Other Statutes**. Neb. Rev. Stat. § 2-238 requires county agricultural societies and county fair boards to comply with the open meetings statutes. Under Neb. Rev. Stat. § 85-1502 all coordination activities conducted by the association of community college area boards are subject to the open meetings statutes.

4. **Exceptions**. The latter portion of § 84-1409(1) provides that two entities are not public bodies for purposes of the Open Meetings Act:

a. **Subcommittees**. Subcommittees of the various bodies described earlier in § 84-1409 are not public bodies under the Open Meetings Act unless a quorum of the public body attends a subcommittee meeting, or unless those subcommittees are holding hearings, making policy or taking formal action on behalf of the parent body. For example, in *Meyer v. Board of Regents of the University of Nebraska*, 1 Neb. App. 893, 510 N.W.2d 450 (Neb. Ct. App. 1993), the court indicated that meetings of an executive subcommittee of the University of Nebraska Board of Regents with the University President to discuss his tenure were not subject to the open meetings laws because of that portion of the statute.

i. In *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 880- 881, 725 N.W.2d 792, 805-806 (2007), the court indicated that, while "subcommittee" is not defined in the Open Meetings Act, a subcommittee is generally a "group within a committee to which the committee may refer business." In addition, "making policy," which subjects a subcommittee to the Open Meetings Act under § 84-1409, apparently includes "receiving background information about a policy issue to be decided." Id. In contrast, "nonquorum gatherings" of members of a public body "intended to obtain information or voice opinions" do not seem to involve violations of the Act. Id.

ii. The language applying the open meetings statutes to certain subcommittee meetings when there is a quorum of the public body present was added to § 84-1409(1) as a result of LB 1019 passed by the Legislature during the 1992 regular session.

b. **Entities Conducting Judicial Proceedings**. Entities conducting judicial proceedings are not public bodies under the Open Meetings Act unless the court or other judicial body is exercising rule making authority, deliberating, or deciding upon the issuance of administrative orders. LB 325, the original open meetings statute of 1975, was directed strictly at policy making bodies which were legislative or quasi-legislative. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14, 1975, at 4618.

i. In *McQuinn v. Douglas County School District No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000), the Nebraska Supreme Court held that a hearing before a school board on the question of the nonrenewal of a probationary certificated teacher's contract where the matters before the board pertained solely to disputed adjudicative facts involved a judicial function, and on that basis, the

hearing was not subject to the open meetings statutes. In that context, a school board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. Adjudicative facts are those ascertained from proof adduced at an evidentiary hearing which relate to a specific party. The *McQuinn* case is discussed further in *Bligh v. Douglas County School District No. 0017*, 2008 WL 2231063, 2008 Neb. App. LEXIS 106 (Neb. Ct. App. 2008)(Not approved for publication).

ii. The Attorney General has determined that hearings before various agencies are judicial and not subject to the open meetings law: 1975-76 Rep. Att'y Gen. 127 (Opinion No. 105, dated July 14, 1975) (hearing before a County Board of Mental Health); Op. Att'y Gen. No. 184 (January 31, 1984) (hearing before the Nebraska Equal Opportunity Commission); Op. Att'y Gen. No. 210 (May 16, 1984) (hearing before a hearing officer appointed by the State Personnel Board); Op. Att'y Gen. No. 02016 (May 21, 2002)(contested case hearing before the Power Review Board on application of electricity suppliers for construction or acquisition of generation facilities); Op. Att'y Gen. No. 05014 (October 19, 2005)(appeal hearing regarding the Nebraska Veterans' Aid Fund before the Nebraska Veterans' Advisory Commission). But, the Attorney General has concluded that a hearing before the Certificate of Need Review Committee is covered by the open meetings statutes. Op. Att'y Gen. No. 87019 (February 13, 1987).

iii. Parole hearings conducted by the Board of Parole are judicial in nature and not subject to the open meetings statutes. However, other statutes specifically pertaining to operation of the Board of Parole require that such parole hearings be conducted with elements of notice and in a manner open to the public. Op. Att'y Gen. No. 93065 (July 27, 1993).

iv. When the State Board of Education holds hearings in contested cases under the state Administrative Procedure Act, such hearings are not subject to the Open Meetings Act. The Board is not required to give notice of such hearings to the public under those statutes, and it may conduct its deliberations and decision-making process for such hearings by a telephone conference call. Op. Att'y Gen. No. 99046 (November 15, 1999).

MEETING DEFINED

Under § 84-1409(2), meetings, for purposes of the open meetings statutes, are defined as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." Section 84-1410(5) also provides that the open meetings statutes shall not apply to "chance meetings or to attendance at or travel to conventions or workshops of members of a public body at which there is no meeting of the body then intentionally convened, if there is no vote or other action taken regarding any matter over which the public body has supervision, control, jurisdiction, or advisory power."

1. The legislative history of LB 325, from 1975, indicates that meetings of a public body do not include social meetings or meetings which were not called by the body. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at 3.

2. However, § 84-1409 was amended by LB 43 in 1983 to include "formal or informal" meetings. The legislative history of that bill indicates that a meeting between a state senator and the members of a local school board to discuss legislation would constitute an "informal called meeting." Government, Military and Veterans' Affairs Committee Hearing on LB 43, 88th Nebraska Legislature, First Session (1983) 5-8.

3. The provision of § 84-1410(5) pertaining to "chance" meetings, etc., was added by LB 43 in 1983.

4. The legislative history of LB 43 from 1983 indicates that a "meeting" does not occur absent a quorum. Government Military and Veterans' Affairs Committee Hearing on LB 43, 88th Nebraska Legislature, First Session (1983) at 19. In addition, the Attorney General has concluded that the presence of a majority of the members of a public body is necessary for a meeting to occur. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975). In *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993), the Nebraska Court of Appeals indicated that "private quorum conferences" are an evasion of the law. The Nebraska Supreme Court also indicated that subgroups of the Omaha City Council constituting less than a quorum of that body were not public bodies on that ground. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

5. In *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993), the Court of Appeals held that informational sessions where the Council heard reports from staff of the Department of Environmental Control were briefings which were subject to the requirements of the open meetings statutes. The Court stated that listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decision making. As a result, receiving information triggers the requirements of the statutes, and the open meetings law applies to meetings at which briefing or the formation of tentative policy takes place, as well as to meetings where action is contemplated or taken.

6. *Rauert v. School District I-R of Hall County*, 251 Neb. 135, 555 N.W.2d 763 (1996), involved allegations by the plaintiff that a quorum of the defendant school board met in the office of the superintendent of schools on a regular basis for "clandestine" meetings before the beginning of most scheduled board meetings where business was discussed and decided and checks were signed to pay claims which had not been approved in public session. The board then allegedly moved and voted on business at its public meeting with little or no discussion in order to deprive the public of the right to be fully informed. The Supreme Court held that the District Court properly failed to find a violation of the Open Meetings Act with respect to those allegations in the absence of any evidence as to the specific dates and details of the alleged "clandestine" meetings.

7. The Attorney General has indicated that an "emergency meeting" may be conducted by electronic and telecommunications equipment including radio and telephone conferences. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975). On the other hand, the open meetings statutes do not generally authorize the use of telephone conference calls for non-emergency meetings of a public body, and absent members of a public body may not be counted to achieve a quorum through the use of a conference call. Op. Att'y Gen. No. 92019 (February 11, 1992). [Section 84-1411 has been amended a number of times to allow specified public bodies including the governing body of an entity formed under the Interlocal Cooperation Act, the Joint Public Agency Act or the Municipal Cooperative Financing Act, the board of an educational service unit, or the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act to meet by telephone conference call in certain circumstances. See 1999 Neb. Laws LB 461; 2000 Neb. Laws LB 968; 2007 Neb. Laws LB 199; 2009 Neb. Laws LB 361.]

8. An "informational and educational" meeting of a public body governing a political subdivision where members generally discuss matters pertaining to their subdivision, hear reports from

various department heads of the subdivision as to their duties and learn the workings of the subdivision is a meeting of the public body for "briefing" purposes which is subject to the open meetings statutes. Op. Att'y Gen. No. 92043 (March 17, 1992). In addition, the Attorney General has also indicated informally that a meeting of a public body "for the purpose of receiving training or doing planning (such as a retreat)" should probably be treated as subject to the Open Meetings Act.

9. In Op. Att'y Gen. No. 94035 (May 11, 1994), the Attorney General indicated that discussions and deliberations by the State Board of Education in connection with the selection of a Commissioner of Education were subject to the requirements of the open meetings statutes. In addition, that opinion indicated that interviews with individual candidates for the Commissioner position were also subject to the requirements of the open meetings statutes, if a quorum of the Board was present for those interviews. However, in the latter interview situation, a brief closed session (as discussed below) might be warranted for a candid discussion by the Board and the candidate which might potentially elicit responses injurious to the reputation of an individual.

10. A workshop held by the Board of Regents of the University of Nebraska with a professional facilitator to discuss communication practices and the roles of the Board and the University President was not subject to the Open Meetings Act on the basis of § 84-1410 (5) which exempts chance meetings or attendance at or travel to conventions or workshops. The University also asserted that there would be no briefing, discussion of public business, formation of tentative policy, vote, or taking of other action at the workshop. Op. Att'y Gen. No. 04027 (October 20, 2004).

PUBLIC MEETINGS BY VIDEOCONFERENCING AND TELEPHONE CONFERENCE CALL

Section 84-1411 allows certain public bodies to meet by videoconferencing and by telephone conference call.

1. **Videoconferencing**. Section 84-1411 was first amended by LB 635 in 1993 to allow meetings of certain public bodies by means of videoconferencing. Under the current amended § 84-1411(2), public bodies which are allowed to meet by videoconferencing include: (1) various bodies of state government including state agencies, boards, commissions, councils and committees, together with their advisory committees; (2) organizations created under the Interlocal Cooperation Act, the Joint Public Agency Act or the Municipal Cooperative Financing Act; (3) governing bodies of public power districts with chartered territories of more than 50 counties in this state; (4) boards of educational service units; and (5) the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act.

a. The public bodies listed above may hold meetings by videoconferencing if the following requirements are met: (1) reasonable advance publicized notice is given, (2) reasonable arrangements are made to accommodate the public's right to attend, hear and speak at the meeting, including seating, recording by audio and visual recording devices, and an reasonable opportunity for input such as public comment or questions to at least the same extent as would be provided absent videoconferencing, (3) at least one copy of all documents being considered is available to the public at each site of the videoconference, (4) at least one member of the public body is present at each site of the videoconference, and (5) no more than one-half of the public body's meetings in a calendar year are held by videoconferencing.

b. Under an amended § 84-1409(3), videoconferencing is defined as "conducting a meeting involving participants at two or more locations through the use of audio-video equipment which allows participants at each location to hear and see each meeting participant at each other location, including public input. Interaction between meeting participants shall be possible at all meeting locations."

c. Under § 84-1411(6) a public body may allow a member of the public or any other witness other than a member of the public body to appear before the public body by means of video or telecommunications equipment.

d. 1999 Neb. Laws LB 87, § 100 added organizations created under the Joint Public Agency Act to the list of entities permitted to conduct meetings by videoconferencing. 2009 Neb. Laws LB 361 added the boards of educational service units to the list.

2. **Telephone Conference Call**. Section 84-1411 was also amended by a number of legislative bills over time (1999 Neb. Laws LB 461; 2000 Neb. Laws LB 968; 2007 Neb. Laws LB 199, 2009 Neb. Laws LB 361) to allow the governing body of an entity formed under the Interlocal Cooperation Act, the Joint Public Agency Act or the Municipal Cooperative Financing Act, the board of an educational service unit, or the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act to meet by telephone conference call if: (1) the territory represented by the educational service unit or the member public agencies of the entity or pool covers more than one county, (2) reasonable advance publicized notice is given which identifies each telephone conference location at which an educational service unit board member or member of the entity's or pool's governing body will be present, (3) all telephone conference meeting sites identified in the notice are located within public buildings used by members of the educational service unit board or of the entity or pool or at a place which will accommodate the anticipated audience, (4) reasonable arrangements are made to accommodate the public's right to attend, hear, and speak at the meeting, including seating, recordation by audio recording devices, and a reasonable opportunity for input such as public comment or questions to at least the same extent as would be provided if a telephone conference call was not used, (5) at least one copy of all documents being considered is available to the public at each site of the telephone conference call, (6) at least one member of the educational service unit board or of the governing body of the entity or pool is present at each site of the telephone conference call identified in the public notice, (7) the telephone conference call lasts no more than one hour and (8) no more than one-half of the board's, entity's or pool's meetings in a calendar year are held by telephone conference call, except that a governing body of a risk management pool that meets at least quarterly and the advisory committees of the governing body may each hold more than one-half of its meetings by telephone conference call if the governing body's quarterly meetings are not held by telephone conference call or videoconferencing. Nothing in this section dealing with telephone conference calls prevents the participation in the call by consultants, members of the press, and other nonmembers of the governing body at sites not identified in the public notice. These telephone conference calls may not be used to circumvent any of the public government purposes established in the Open Meetings Act.

a. 1999 Neb. Laws LB 47, § 2 also amended § 84-1411 (2) to provide that certain meetings of the Judicial Resources Commission may be held by telephone conference if the criteria for videoconferencing listed above are met.

3. **Circumvention of Open Meetings Act**. Under § 84-1411, videoconferencing, telephone conferencing or conferencing by other electronic communication may not be used to circumvent any of the public government purposes established by the Open Meetings Act. Neither may emails, faxes, or other electronic communications be used for such purposes.

PUBLIC MEETINGS; NOTICE REQUIRED AND AGENDA

Section 84-1411 sets out several requirements for the notice which must be given for a public meeting and for the agenda which must be prepared: (1) the public body must give reasonable advance publicized notice of the time and place of each meeting by a method designated by the body and recorded in its minutes, (2) that notice must be transmitted to all members of the body and to the public, (3) the notice must contain an agenda of subjects known at the time of the publicized notice, or a statement that such an agenda, which must be kept continually current, is readily available for inspection at the principal office of the public body during normal business hours.

1. **Agenda**. Under § 84-1411(1), an agenda maintained at the office of a public body for public inspection must be kept continually current and may not be altered later than 24 hours before the scheduled commencement of the public meeting (or 48 hours before commencement of a meeting of a city council if that meeting is noticed outside the corporate limits of the municipality). A public body may modify an agenda to include items of an emergency nature only at such public meeting.

2. **Specificity of the Agenda** . LB 898 from 2006 added language to § 84-1411 (1) which states that agenda items shall be "sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." That statutory change arose out of a sense that lack of specificity in meeting agendas was a major issue of concern around the state. Government Military and Veterans' Affairs Committee Hearing on LB 898, 99th Nebraska Legislature, Second Session (2006) at 19. The intent of the change was to require public bodies to include sufficient detail in their agendas regarding issues to be discussed or acted upon so as to provide information and notice to the public. Floor Debate on LB 898, 99th Nebraska Legislature, Second Session, March 28, 2006 at 11701 (Statement of Senator Preister). The change was also intended to require sufficient detail in an agenda so that members of the public are not forced to look at past agendas in order to understand the issue to be discussed and/or the action to be taken. Id.

3. **News Media**. Section 84-1411(4) requires that the secretary or other designee of each public body shall maintain a list of news media requesting notification of meetings and shall make reasonable efforts to provide advance notification to that list of media of the time and place of each meeting and the subjects to be discussed at that meeting.

4. **History**. The provision of § 84-1411 which prohibits altering an agenda within 24 hours of a meeting was added in 1983 to prevent addition of last minute matters to an agenda which did not really represent emergencies. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 22, 1983, at 1896.

5. In *Rauert v. School District I-R of Hall County*, 251 Neb. 135, 555 N.W.2d 763 (1996), the court stated that the Open Meetings Act requires public bodies to give reasonable advance publicized notice of the time and place of their meetings, in part so that the public may attend and speak at those meetings.

6. The Legislature has imposed only two conditions on public bodies regarding the method of notification for their meetings: 1. the public body must give reasonable advance publicized notice of the time and place of each meeting, and 2. the method of notification must be recorded in the public body's minutes. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). There is no minimum time period for public notification of a special meeting, and an agenda for a public meeting can be created (not altered) later than 24 hours before the scheduled meeting. Id. In the *City of Elkhorn* case, the court held that notice of a meeting of the Omaha City Council posted and placed on the city's website at 10:15 a.m. for a meeting at 10:00 p.m. the same day was sufficient under the facts of the case where the local newspaper printed an article about the meeting in its afternoon edition and four television broadcasters were present at the meeting. The court also indicated that any defect in notice intended for the benefit of council members would not invalidate a council meeting when all of the members of the council attended without objection.

7. The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). In Pokorny, the agenda at issue, considered with all the previous records of the city council involved, was sufficient to satisfy the open meetings statutes. Pokorny also indicates that posting notice at 10 p.m. on March 15 before a meeting at 10:30 a.m. on March 16 does not constitute reasonable notice. Posting notice one week ahead does.

8. In *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), aff'd, 256 Neb. 1, 588 N.W.2d 589 (1999), the Court of Appeals considered whether an agenda item which simply stated "Work Order Reports" was sufficient to give adequate public notice of a decision to approve a work order which involved expenditure of over $47 million for the construction of a 96-mile power transmission line across privately held property to connect two power substations. The Court held that the agenda item was insufficient under the Open Meetings Act. The court also seemed to suggest, based upon the *Pokorny* case, that the sufficiency of an agenda item might by measured, at least to some degree, in the context of the other meetings of the public body immediately prior to the public meeting in question.

9. A member of the public should not be required to hunt up and read the documents underlying an agenda of a public body to determine what is actually on that agenda. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), aff'd, 256 Neb. 1, 588 N.W.2d 589 (1999).

10. If a public body uses or publishes its agenda to give the required notice for a particular meeting, then the notice contained in the agenda must comport with the law for giving notice of what is to be considered at the meeting. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), aff'd, 256 Neb. 1, 588 N.W.2d 589 (1999).

11. A notice of a hearing, given by a school board, which stated that a hearing would be held, and that an agenda would be available for inspection, once established, is not proper notice. An agenda must be available. *Allen v. Greeley County School District No 501*, 1994 WL 272223, 1994 Neb. App. LEXIS 186 (Neb. Ct. App. 1994)(Not approved for publication)

12. When governmental subdivisions which hold annual meetings, such as townships, conduct their annual meeting, electors who participate in the annual meeting must place matters which

they wish to discuss on the agenda for the annual meeting. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007). Electors under those circumstances may not simply appear at the annual meeting and bring up any subject falling within the broad powers of electors if that subject is not on the agenda. Id.

13. Two separate public bodies may publish notice of their meetings on the same sheet of paper and need not use separate sheets when the notices contain only the time and place of their meetings, and when the notices direct interested citizens to the place where agendas for each body may be found. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009). In addition, two separate public bodies may combine their agendas when the combined agendas make it clear which items are to be addressed by each body. Id. The same rule applies to combined minutes. Id. The Wolf case involved a situation where a county board met both as a county board and as a county board of equalization.

14. Placing notice of future meetings in minutes of a prior meeting does not give sufficient notice under the Open Meetings Act. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009).

15. Notice of recessed or reconvened meetings of a public body must be given in the same fashion as notice of the original meeting. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009).

16. The Attorney General has concluded that "advance publicized notice" means a separate, specific advance notice must be given for each meeting. 1971-72 Rep. Att'y Gen. 314 (Opinion No. 137, dated August 8, 1972).

17. The Attorney General has also determined that: (1) an agenda may not be used as the minutes of a meeting, (2) reasonable notice under the statute means notice reasonably calculated to give appropriate notice to citizens of the time and place of a meeting and notice which complies with the formal requirements of the statute. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975).

18. In Op. Att'y Gen. No. 96071 (October 28, 1996), the Attorney General indicated that the Quality Jobs Board should give its normal 10-day published notice of meeting rather than an "informal" notice where the Board had recessed a previous meeting on a tax credit application pending a renewed meeting call from the Governor after issuance of an opinion from the Attorney General.

EMERGENCY MEETINGS

Section 84-1411(5) allows public bodies to hold emergency meetings without reasonable advance public notice. There are several statutory requirements with respect to such emergency meetings: (1) the nature of the emergency shall be stated in the minutes, and any formal action taken shall pertain only to the emergency, (2) the provisions of § 84-1411(4) dealing with notice to the media shall be complied with in connection with an emergency meeting, (3) complete minutes of the emergency meeting specifying the nature of the emergency and any formal action taken at the meeting shall be made available to the public no later than the end of the next regular business day.

1. Under § 84-1411(5), emergency meetings may be held by electronic or telecommunications equipment.

2. In *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994), the Court indicated, in a case involving allegations of a violation of the open meetings statutes, that an emergency is defined as "any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition." In that case, the Court held that a township board meeting to consider the job status of a township employee, convened as an emergency meeting because of a snowstorm, was not a proper emergency meeting because the employee was given two week's notice of his resultant termination, and because the reasons given for the employee's termination were based upon his past performance.

3. In *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) the Court of Appeals considered whether a number of items taken up at meetings of a county board without any listing on the board's agenda were "emergency" items. In making that determination in each case, the court focused upon whether there was anything in the record which indicated that a particular item required immediate action or involved pressing necessity.

3. The Attorney General has also stated that an item of an emergency nature is one that requires immediate resolution by the public body, and one which has arisen in circumstances impossible to anticipate at a time sufficient to place on the agenda of a regular, called, or special meeting of the body. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975).

4. In Op. Att'y Gen. No. 95063 (August 9, 1995), the Attorney General indicated that action taken during a meeting of the Nebraska Equal Opportunity Commission by a telephone conference call which did not comply with the requirements of the open meetings statutes for emergency meetings was void.

PUBLIC MEETINGS; MINUTES AND VOTING PROCEDURES

Section 84-1413 contains several provisions regarding the minutes which are to be maintained by public bodies and regarding voting procedures for public bodies.

1. **Minutes**. Every public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed. The minutes of all meetings and evidence or documentation received or disclosed during open session shall be public records, open to public inspection during normal business hours. Minutes shall be written and available for inspection within 10 working days or prior to the next convened meeting, whichever occurs earlier, except that cities of the second class and villages may have an additional 10 working days if the employee responsible for writing the minutes is absent due to a serious illness or emergency.

2. **Voting procedures**. Any action taken on any question or motion duly made and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting. The vote to elect leadership within a public body may be by secret ballot, but the total number of votes for each candidate shall be recorded in the minutes.

a. **Electronic Voting Devices**. The roll call or viva voce vote requirements of the Open Meetings Act may be satisfied by a municipality, a county, a learning community, a joint entity created pursuant to the Interlocal Cooperation Act, a joint public agency created pursuant to the Joint Public Agency Act or an agency formed under the Municipal Cooperative Financing Act which uses an electronic voting device which allows the vote of each member of the governing body to be readily seen. The governing bodies permitted to use electronic voting devices was broadened by 2009 Neb. Laws. LB 361.

3. In *State ex rel. Schuler v. Dunbar*, 208 Neb. 69, 302 N.W.2d 674 (1984), the Supreme Court held that the requirement of § 84-1413(2) that the record shall state how each member of a body voted could not be satisfied by a nunc pro tunc amendment to the body's minutes showing that the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place. However, when the same case was before the court a second time, the court held that, as a general rule, a public body may, if no intervening rights of a third person have arisen, order the minutes of its own proceedings at a previous meeting to be corrected according to the facts to make them speak the truth. *State ex rel. Schuler v. Dunbar*, 214 Neb. 85, 333 N.W.2d 652 (1983).

4. Section 84-1413 is violated by a failure to make or take a vote in accordance with the statute rather than a failure to record a properly taken vote. *State ex rel. Schuler v. Dunbar* (1983), supra.

5. Section 84-1413(2) dealing with roll call votes does not require the record to state that the vote was by roll call but only requires that the record show if and how each member voted. Neither does that statute set a time limit for recording the results of a vote. *State ex rel. Schuler v. Dunbar* (1983), supra.

6. The statutory requirements here dealing with voting and minutes are mandatory since the Legislature provided that action taken in violation of this statute is void. *State ex rel. Schuler v. Dunbar* (1981), supra.

7. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) seems to indicate that the Open Meetings Act does not require that minutes of meetings be "published," but only that they be written and available for inspection within 10 working days or prior to the next convened meeting of the public body.

8. The legislative history of the original open meetings statutes, LB 325 from 1975, indicates that the requirement of a roll call vote was directed at votes on questions that would bind the particular public body. Other procedural questions were not covered. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session, (1975) at 10.

9. The Attorney General has stated that nothing in the open meetings statutes requires approval of the minutes of a public body prior to their publication. Op. Att'y Gen. No. 162 (December 28, 1981).

10. In Op. Att'y Gen. No. 98045 (November 4, 1998), the Attorney General indicated that detailed minutes of all matters discussed need not be maintained when a public body is meeting in closed or executive session, so long as the requirements of § 84-1410 pertaining specifically to the minute entries necessary for a closed session are met.

PUBLIC MEETINGS; RIGHTS OF THE PUBLIC ATTENDING

Section 84-1412 establishes the rights of members of the public attending a meeting of a public body.

1. Members of the public have the right to attend and the right to speak at meetings of public bodies, and all or any part of a public meeting except closed sessions under § 84-1410, may be videotaped, recorded, televised, broadcast, photographed, etc. by any person.

2. Public bodies may make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, or recording their meetings. A public body is not required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.

3. Members of the public cannot be required to identify themselves as a condition for admission to a public meeting. The public body may require persons desiring to address the body to identify themselves.

4. No public body shall, to circumvent the open meetings laws, hold its meeting in a place known to be too small to accommodate the anticipated audience. However, a public body shall not be in violation of this prohibition if it meets in its traditional meeting place in this state.

5. LB 898 from 2006 added language to § 84-1412 which provides that public bodies shall make available at least one current copy of the Open Meetings Act posted in the meeting room at a location accessible to members of the public. At the beginning of any meeting, the public shall be informed about the location of the posted information. The legislative history of LB 898 indicates that "posting" a copy of the Open Meetings Act means putting it up in some fashion, including attaching it to a bulletin board, hanging it by a chain or fastening it to a wall. Floor Debate on LB 898, 99th Nebraska Legislature, Second Session, March 28, 2006 at 11697 (Statement of Senator Preister). "Posting" does not include placing the Act on a table as a loose document which can be removed and therefore might not be available throughout the meeting. Id. If a meeting of a public body is moved to another location to accommodate a larger audience, then the posted copy of the act should be moved and posted in the new location. Id.

6. In 2008, LB 962 amended § 84-1412 to provide that public bodies may not require that "the name of any member of the public be placed on the agenda prior to . . . [a] meeting in order to speak about items on the agenda." That change was made so that members of the public are not required to place themselves on the agenda of a public body prior to a meeting in order to speak on agenda items during the times at that meeting set aside for public comment. Floor Debate on LB 962, 100th Nebraska Legislature, Second Session, February 28, 2008 at 2 (Statement of Senator Preister). That change in statutory language was not intended to affect the right of a public body to make reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, or recording its meetings. Id.

7. A public body may hold a meeting outside the State of Nebraska only if all the following conditions are met: a. a member entity of the public body is located outside of the state and the meeting is in that member's jurisdiction, b. all out-of-state locations identified in the notice of meeting are located within public buildings used by members of the entity or at a place which will accommodate the anticipated audience, c. reasonable arrangements are made to

accommodate the public's rights to attend, hear and speak at the meeting, including making a telephone conference call available at an instate location to members, the public, or the press, if requested twenty-four hours in advance, d. no more than 25% of the public body's meetings in a calendar year are held out-of-state, e. out-of-state meetings are not used to circumvent any of the public government purposes established by the Open Meetings Act, f. reasonable arrangements are made to provide viewing at other instate locations for a videoconference meeting if requested fourteen days in advance and if economically and reasonably available in the area, and g. the public body publishes notice of the out-of-state meeting at least 21 days before the date of the meeting in a legal newspaper of statewide circulation. These requirements for out-of-state meetings were added to § 84-1412 by 2001 Neb. Laws. LB 250, § 2.

8. A public body shall, upon request, make a reasonable effort to accommodate the public's right to hear discussion and testimony at a public meeting. Public bodies shall make at least one copy of reproducible written material discussed at an open meeting available at the meeting or at the instate location for a telephone conference call or video conference for examination and copying by members of the public.

9. **History**. Many of the initial provisions in § 84-1412 dealing with the rights of the public were added as a result of LB 43 in 1983.

10. The language requiring a reasonable effort to allow all parties to hear a public meeting does not involve an absolute requirement that all persons present shall be able to hear. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 21, 1983, at 1794-1795.

CLOSED SESSIONS OF A PUBLIC BODY

Section 84-1410, pertaining to closed sessions of public body, has generated the most controversy of all the portions of the open meetings statutes. Section 84-1410(1) provides that any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary (1) for the protection of the public interest, or (2) for the prevention of needless injury to an individual, if such individual has not requested a public meeting. Closed meetings may not be held for discussion of the appointment or election of a new member to any public body. Nothing in ' 84-1410 should be construed to require that any meeting be closed to the public.

1. Under § 84-1410(1), examples of reasons for a closed session include:

a. Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body.

b. Discussion regarding deployment of security personnel or devices.

c. Investigative proceedings regarding allegations of criminal misconduct.

d. Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.

These examples are not exclusive; they are merely examples, and other reasons may exist. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at page 3; 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975); Op. Att'y Gen. No. 65 (April 17, 1985).

2. LB 898 from 2006 amended some of the provisions of § 84-1410 pertaining to the mechanics of holding a closed session. The subject matter of the closed session and reason necessitating the closed session shall be identified in the motion to hold a closed session. The vote to hold a closed session must be taken in open session, and the entire closed session motion, the vote of each member on the question of holding a closed session, and the time when the closed session commences and ends must be recorded in the minutes. If the motion to close passes, then the presiding officer shall restate on the record immediately prior to the closed session the limitation of the subject matter of the closed session. The public body holding a closed session shall restrict its consideration of matters during the closed session to only those purposes set forth in the motion to close as the reason for the closed session. The meeting must be reconvened in open session before any formal action may be taken, and "formal action" in that context is defined in § 84-1410(2) to mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy. Under an amendment to § 84-1410(2) effected by LB 621 in 1994, formal action by the body in that context does **not** include, "negotiating guidance given by members of the public body to legal counsel or other negotiators in a closed [strategy] session authorized [for collective bargaining, real estate purchases, etc.] under subdivision 1(a) of [Section 84-1410]."

3. Any member of the public body can challenge the continuation of a closed session if he or she determines that the session has exceeded the original reason for the closed session, or if he or she contends that the closed session is neither clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of an individual. Such a challenge can only be overruled by a majority vote of the members of the public body. Such challenge and its disposition shall be recorded in the minutes.

4. **History**. One of the purposes for the initial open meetings statute, LB 325 from 1975, was to tighten restrictions on closed or executive sessions of public bodies. Introducer's Statement of Purpose for LB 325, 84th Nebraska Legislature, First Session (1975). The fourth example of reasons for closed meetings was added by LB 43 in 1983. The provisions dealing with pending or imminent litigation and defining formal action in a closed session were added as a part of LB 1019 in 1992.

5. It is not entirely clear what vote of the public body is necessary to go into closed session. The statute states that "an affirmative vote of a majority of [the body's] voting members" is necessary for a closed session. On its face, the normal meaning of this language would presumably be a majority of those members present and voting. This is particularly true since the later subsection (3) of § 84-1410 requires a "majority vote of the members of the public body" to overrule a challenge to the continuation of the closed session. However, the legislative history of LB 325 makes it quite clear that the legislators intended to make the requirement for a closed session a vote of the majority of the body rather than a vote of the majority of those present and voting. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14 and May 20, 1975, at 4616, 5015. Moreover, there is some indication that "voting" members in § 84-1410(1) refers to particular members of bodies such as the Board of Regents which has both voting and non-

voting members. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at 27-28. The safer approach is to authorize a closed session of the public body by a majority vote of the members of the body rather than by a majority vote of just those members present.

6. The landmark case for what is permissible in a closed session is *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). *Grein* involved a closed session by a school board for discussion of the low bid on a construction project. The supreme court held that the closed session was improper. That case indicates:

a. Provisions of the statute permitting closed sessions must be narrowly and strictly construed. See also *State ex rel. Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148, 728 N.W.2d 275 (2007).

b. The public interest which is protected in § 84-1410(1) is "that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities." 216 Neb. at 165, 343 N.W.2d at 723. See also *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002).

c. Good faith motivation for a closed session is not a cure for non-compliance with the public meetings laws.

d. The prohibition against decisions or formal actions in a closed session proscribes crystallization of a secret decision and then ceremonial acceptance in open session.

e. **There is a guiding principle with respect to closed sessions: "If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public."** 216 Neb. at 168, 343 N.W.2d at 724.

7. *Pokorny v. City of Schuyler*, supra, indicates that there is nothing in the open meetings statutes which requires that negotiations for the purchase of land be conducted in open meeting, but deliberations of a public body as to whether an offer to purchase should be made must be done in an open meeting.

8. In a case involving the revocation of a land surveyor's license, the supreme court held that a closed session was improper since there was no showing of either necessity or of the reasons set out in § 84-1410(1). *Simonds v. Board of Examiners of Land Surveyors*, 213 Neb. 259, 329 N.W.2d 92 (1983).

9. Neb. Rev. Stat. § 79-832 (1996), dealing with hearings involving cancellation, amendment or termination of a teacher's contract mandates a closed hearing upon an affirmative vote of a majority of the school board's members present and voting and upon specific request of the certificated employee or the certificated employee's representative. However, under that section, formal action by the school board requires that the school board reconvene in open session. *Stephens v. Board of Education of School District No. 5*, Pierce County, 230 Neb. 38, 429 N.W.2d 722 (1988).

10. The provisions of the open meetings statutes dealing with closed sessions, in part, reflect the Legislature's judgment of the appropriate balance between the public's interest in open discussion of governmental issues and the rights of individuals, such as state employees, to have their performance as employees considered in private if they so choose. *Meyer v. Board of Regents of the University of Nebraska*, 1 Neb. App. 893, 510 N.W.2d 450 (Neb. Ct. App. 1993).

11. If the primary purpose for a closed session of a public body is authorized under the open meetings statutes, then any necessary discussion of incidental matters is also authorized. *Meyer v. Board of Regents of the University of Nebraska*, 1 Neb. App. 893, 510 N.W.2d 450 (Neb. Ct. App. 1993). In the *Meyer* case, the Nebraska Court of Appeals indicated that the University Board of Regents could properly discuss the appointment of an interim president for the University during a closed session called to evaluate and consider the employment status of the president.

12. In *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002), the court held that if a person who is present at a meeting of a public body observes an alleged violation of the Open Meetings Act in the form of an improper closed session and fails to object, then that person waives his or her right to object to the closed session at a later date. However, that case appears to be legislatively overruled by LB 898 from 2006 which provides that it shall not be a defense to a citizen lawsuit under § 84-1414 (3) that the citizen attended the meeting and failed to object at that time.

13. There is no absolute evidentiary privilege which applies to all communications made during a closed session of a public body, and communications made during such closed sessions are discoverable. *State ex rel. Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148, 728 N.W.2d 275 (2007). However, to the extent that communications made during a closed session implicate other recognized privileges such as the attorney/client privilege, those communications are protected. Id.

14. The statutory provision allowing public bodies to hold closed sessions for "strategy sessions" regarding litigation or threatened litigation by necessity encompasses discussions and decisions regarding whether to make or reject a settlement offer. Such decisions regarding litigation strategy should not have to be discussed publicly, during an open session, in front of the body's opponent. *Becker v. Allen*, 1996 WL 106217, 1996 Neb. App. LEXIS 73 (Neb. Ct. App. 1996) (Not approved for publication). In addition, the strategic meetings which a public body has with its attorney when threatened with or engaged in litigation, in which the public body may give direction to its attorney, are protected by the attorney-client privilege. Id.

15. **Opinions of the Attorney General**:

a. A closed session is not proper simply because matters permitting a closed session might arise. Such a closed session is permitted only when such matters do arise and must be dealt with. Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 11 (January 20, 1983).

b. Discussions of legal matters between a county board and a county attorney involving pending litigation or legal consequences of specific action are suitable for a closed session. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975).

c. A public body can go into a proper closed session for discussion of personnel matters and then reconvene for a public vote with no lengthy explanation of the rationale underlying the decision. Op. Att'y Gen. No. 89063 (October 12, 1989).

d. The closed session exception for prevention of needless injury to reputation is for the protection of individual employees and not for the protection of governmental officers on the public body. Id.

e. In Op. Att'y Gen. No. 98045 (November 4, 1998), the Attorney General indicated that detailed minutes of all matters discussed need not be maintained when a public body is meeting in closed or executive session, so long as the requirements of § 84-1410 pertaining specifically to the minute entries necessary for a closed session are met.

f. A county clerk, county attorney and county treasurer acting as a group under § 32-567 (3) to make an appointment to fill a vacancy on a county board may not go into closed session for evaluation of the merits of the candidates based upon the express language of § 84-1410 (1). Op. Att'y Gen. No. 97050 (September 18, 1997).

g. The Attorney General has indicated informally that developing testimony for an upcoming Legislative hearing is not a proper reason for a state agency to go into closed session. On the other hand, the Attorney General has also indicated informally that discussion of "sensitive medical and financial information" pertaining to specific individuals who applied for admission to a state home could be conducted in a closed session so long as the actual vote on admission was done in an open meeting.

CIRCUMVENTION OF THE OPEN MEETINGS ACT

Section 84-1410(4) prohibits a person or a public body from circumventing the purpose of the open meetings statutes by failing to invite a portion of its members to a meeting or by designating itself as a subcommittee of the whole body. That section also prohibits the use of any closed session, informal meeting, chance meeting, social gathering, e-mail, fax or other electronic communication for the purpose of circumventing the requirements of the open meetings statutes.

1. This provision was added to the open meetings statutes by LB 43 in 1983. This section was directed at the intentional circumvention of the open meetings statutes rather than inadvertent acts. Government, Military and Veterans' Affairs Committee Hearing on LB 43, 88th Nebraska Legislature, First Session (1983) at 5.

2. 2004 Neb. Laws LB 1179 added e-mails, faxes and other electronic communications to the list of mediums which could not be used to circumvent the requirements of the Open Meetings Act.

3. Similar language prohibiting the use of telephone conference calls, emails, faxes, or other electronic communications to circumvent any of the public government purposes of the Open Meetings Act is contained in § 84-1411 (3).

4. The Attorney General has indicated that intent is a necessary element of the conduct prohibited by § 84-1410 (4), and that members of a public body can communicate with other

members of that body by electronic means, even if that communication is directed to a quorum of the body, so long as there is no course of communication which becomes sufficiently involved so as to evidence an intent or purpose to circumvent the Open Meetings Act. Op. Att'y Gen. No. 04007 (March 8, 2004).

ACTIONS FOR ENFORCEMENT

Section 84-1414 sets out various enforcement options available to individuals who believe that the open meetings statutes have been violated.

1. Any motion, resolution, rule, ordinance, or formal action of a public body made or taken in violation of the public meetings statutes shall be declared void by the district court if the suit is commenced within 120 days of the meeting of the public body at which the alleged violation occurred. Any such motion or other action taken in substantial violation of the public meeting statutes shall be voidable by the district court if the suit is commenced after more than 120 days but within one year of the meeting of the public body in which the alleged violation occurred. A suit to void any final action shall be commenced within one year of the action.

2. Under § 84-1414(3), any citizen of this state may commence a suit in the district court of the county in which the public body ordinarily meets or in which the plaintiff resides for the purpose of requiring compliance with or preventing violations of the open meetings statutes, for the purpose of declaring an action of a public body void, or for the purpose of determining the applicability of the open meetings statutes to discussions or decisions of the public body. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). The court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under § 84-1414(3). Under LB 898 from 2006, it shall not be a defense to such a suit that the citizen attended the meeting and failed to object to violations at such time.

3. The Attorney General and the county attorney of the county in which the public body ordinarily meets shall enforce the provisions of the open meetings statutes.

4. **History**. The original version of § 84-1414(1), which was a part of LB 325 passed in 1975, simply provided that actions taken in violation of the public meetings statutes should be void. The void/voidable distinction was added by LB 43 in 1983. The apparent intent of that later language was to allow a court to void an action by a public body taken when there was any violation of the open meetings statutes if the action was filed within four months of the meeting in question. After four months, the violation of the open meetings statutes would have to be substantial to allow a court to void the action of the public body. In any event, no action could be brought after one year of the public meeting in question. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 22, 1983, at 1892.

5. The legislative history of LB 325 from 1975 indicates that the initial intent of that statute was to have the county attorney responsible for enforcement proceedings involving public bodies at a local level. The Attorney General would be responsible for enforcement against state entities. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14 1975, at 4620.

6. The Nebraska Supreme Court has indicated that action by a public body which is proper under the open meetings statutes may cure defects in actions previously taken by the same public body. In such an instance, an action by a public body which previously might have been declared void will be declared proper. *Pokorny v. City of Schuyler*, supra. On the other hand,

under those circumstances, the original improper meeting itself is still void. *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994). Pokorny also indicates that the effect of an invalid public meeting under the open meetings laws is the same as if the meeting had never occurred.

7. A county lacks capacity to maintain an action to declare its official conduct void for non-compliance with the open meetings statutes. *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988).

8. Reading of a city ordinance in accordance with a city charter constitutes "formal action" of a city council which may be voided in a lawsuit under § 84-1414 (1). *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

9. A number of Nebraska cases deal with waiver of rights under the Open Meetings Act by a failure to make a timely objection to violations of the Act. *Stoetzel & Sons, Inc. v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003) (if a person who attends a meeting of a public body believes that copies of documents discussed by the body should be made available to the public at the meeting, a timely objection should be made, or that person waives his or her right to object); *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Witt v. School District No. 70*, *Frontier County*, 202 Neb. 63, 273 N.W. 2d 669 (1979)(any person who has notice of a meeting and attends the meeting is required to object specifically to a lack of public notice at the meeting or waive his rights to object on that ground under the open meetings statutes); *Hauser v. Nebraska Police Standards Advisory Council*, 264 Neb. 944, 653 N.W.2d 240 (2002) (if a person present at a meeting observes and fails to object to an alleged open meetings violation in the form of a failure to conduct roll call votes before taking action on questions or motions pending, that person waives his or her right to object at a later date); *Alexander v. School District No. 17 of Thurston County*, 197 Neb. 251, 248 N.W.2d 335 (1976) (where teachers had notice of a termination hearing, appeared, and no objection was made to a failure of the school board to give proper notice under the open meetings statutes, those teachers waived any objection they might have had to violations of the open meetings law). Those cases appear to be legislatively overruled by LB 898 from 2006 which provides that it shall not be a defense to a citizen lawsuit under § 84-1414 (3) that the citizen attended the meeting and failed to object at that time.

10. Actions for relief under the open meetings statutes are tried as equitable cases, given the fact that the relief sought is in the nature of a declaration that particular action taken in violation of the laws is void or voidable. Such cases are also considered as equitable cases on appeal. *Stoetzel & Sons, Inc. v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003); *Hauser v. Nebraska Police Standards Advisory Council*, 264 Neb. 944, 653 N.W.2d 240 (2002); *Wolf v. Grubbs*, 17 Neb. App. 292, 759 NW. 2d 499 (Neb. Ct. App. 2009); *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), aff'd, 256 Neb. 1, 588 N.W.2d 589 (1999).

11. The *Hansmeyer* case also discusses the distinction between "void" and "voidable" under § 84-1414. "Void" means ineffectual and having no legal force or binding effect, while "voidable" means that which may be avoided or declared void, not absolutely void. In *Hansmeyer*, the court considered factors such as whether any purpose would be served or whether decisions

were made in secret without public discussion in determining whether a voidable vote by the Nebraska Public Power District should, in fact, be voided.

12. Once a meeting has been declared void pursuant to the Open Meetings Act, the members of the public body involved are prohibited from considering any information which they obtained at the illegal meeting. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009); *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).

13. The decision to award attorneys fees to a "successful plaintiff" in an action under § 84-1414 is discretionary with the trial court. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), aff'd, 256 Neb. 1, 588 N.W.2d 589 (1999). The court in *Hansmeyer* also held that the plaintiffs in that case were "successful plaintiffs" who could recover attorneys fees under § 84-1414 because there was a finding that a substantial violation of the open meetings statutes had occurred, and because the public body involved amended its practices to prepare proper agendas after the plaintiffs filed their action. The court reached that conclusion even though it ultimately determined that the improper action of the public body at issue should not be voided. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) also contains a discussion regarding the basis for an award of attorneys fees in that case, including the court's analysis of why it reduced a fee award on appeal.

14. Voiding an entire meeting is a proper remedy for violations of the Open Meetings Act. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009). The court in the Wolf case also specifically considered whether violations of the Open Meetings Act were "substantial" violations in determining whether it was appropriate to void actions of a county board when the enforcement lawsuit was filed more than 120 days after the meetings in question.

15. In *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) there was no evidence in the record which established that a county board had published notice of its meetings anywhere. The Court of Appeals held that in the absence of contrary evidence, it may be presumed that public officers faithfully performed their official duties. Id. In addition, absent evidence showing misconduct or disregard for the law, the regularity of official acts is also presumed. Id. In Wolf, the court also indicated that the plaintiffs had the burden at all times to show that it was more probable that notices of meetings were not posted than probable that they were.

16. The United States District Court for the District of Nebraska has indicated that it has supplemental jurisdiction over claims under § 84-1414 based upon 28 U.S.C. § 1367 (a). *Buzek v. Pawnee County Nebraska*, 207 F.Supp.2d 961 (D. Neb. 2002).

CRIMINAL SANCTIONS

Section 84-1414(4) provides that any member of a public body who knowingly violates or conspires to violate the Open Meetings Act, or who attends or remains at a meeting knowing that the public body is in violation of any provision of that Act, shall be guilty of a Class IV misdemeanor for a first offense, and a Class III misdemeanor for a second or subsequent offense.

1. The legislative history of LB 325 from 1975 indicates that the criminal sanctions included in this section were originally directed at intentional behavior rather than at inadvertence.

Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at 16.

2. The criminal sanctions for violation of the open meetings statutes were first increased as a result of LB 1019 passed in 1992. Also, that same bill in 1992 added language which made knowingly remaining at or attending a meeting in violation of the open meetings statutes a crime. The present language which applies criminal sanctions to those members of a public body who remain at a meeting knowing that the public body is in violation of the open meetings statutes was added by LB 621 in 1994.

3. Under Neb. Rev. Stat. § 28-106 (2008), a Class IV misdemeanor is punishable by a fine of from $100 to $500 and no imprisonment. In addition, a Class III misdemeanor is punishable by up to 3 months imprisonment or up to a $500 fine, or both. A Class III misdemeanor has no minimum penalty.

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City of Grand Island

Tuesday, November 01, 2011
Study Session

Item -2

Discussion Concerning Amending the City of Grand Island Police Officer's and Firefighters' Retirement System Plan and Trust for Changes in the Applicable Tax Laws

Staff Contact: Jaye Monter

Council Agenda Memo

From: Mary Lou Brown, City Administrator

Meeting: November 1, 2011

Subject: Amending the City of Grand Island Police Officers' and Firefighters' Retirement System Plan and Trust for Changes in the Applicable Tax Laws.

Item #'s: 2

Presenter(s): Jaye Monter, Interim Finance Director

Background

At the October 25, 2011 Council Meeting, Council was presented with an Amendment to the City's retirement plan documents which incorporate recent changes to pension laws and regulations for which plan documents need to be updated. Due to the number of questions from Council Members at the October 25, 2011 meeting, the Wells Fargo Police Officers' and Firefighters' Retirement Plan Representative Greg Anderson will be available to answer all questions.

Following is a brief summary of each article of the amendment. Generally, requirements must be included in plan documents. However, some provisions do not apply because this is a government plan or for other reasons, as noted. All provisions nevertheless are included in the amendment to provide a record of applicable authority for reference when the plan is required to be restated in a few years.

Discussion

ART	EXPLANATION
I	General provisions regarding amendment, effective date, etc.
II	Summary of provisions covered in the amendment.
III	Specifies actuarial factors – i.e. interest rate and mortality table – that must be used to determine compliance with limitations on benefits imposed by Internal Revenue Code §415.
IV	Any beneficiary under a qualified plan who is not a spouse and is entitled to a benefit eligible for a rollover can directly roll the distribution over to an IRA.

V After-tax contributions received in a distribution, if any, can be rolled over, as well, to certain types of retirement plans.

VI Extends period for giving participants notice of distributions from 90 to 180 days. Notice of distributions must include a statement of the effect of delaying distributions and explanation of relative values of optional forms of benefit. Requirements do not apply to governmental plans.

VII Domestic relations order directing division of benefits upon a participant's divorce will not fail in certain cases due to the timing of issuance of the order.

VIII No in-service distributions are allowed upon reaching early retirement age.

IX Participants are allowed to elect qualified optional survivor annuity permitted under the plan. Requirements do not apply to governmental plans.

X Direct rollover of a lump sum distribution is permitted to a ROTH IRA.

XI Substitute "severance from employment", a defined term in the Internal Revenue Code, for "separation from service" for required "top heavy" nondiscrimination testing of the plan. Governmental plans are exempt from top heavy testing.

XII Changes to reflect new laws and regulations adopted in recent years regarding underfunded pension plans, specifically restricting optional payments and additional benefit accruals while a plan is in an underfunded state, and requiring annual reporting to plan participants. Requirements do not apply to governmental plans.

XIII Incorporate required changes for plan participants in military service, some of which do not apply because of unique terms of the plan.

XIV Incorporate certain interest rate and mortality assumptions for lump sum payouts and other plan provisions, to the extent applicable.

XV Reflect suspension of 2009 required minimum distributions for participants who reach the later of 70 ½ and retirement.

Conclusion

This item is presented to the City Council in a Study Session to allow for any questions to be answered by the Police Officers' and Firefighters'' Retirement Plan Wells Fargo Representative Greg Anderson.

It is the intent of City Administration to bring this item to the November 8, 2011 Council Meeting.

CITY OF GRAND ISLAND, NEBRASKA POLICE OFFICERS' RETIREMENT SYSTEM PLAN AND TRUST ("PLAN")

AMENDMENT NO. 1

ARTICLE I
PREAMBLE

1.1 **Plan and amendment authority.** The City of Grand Island, a Nebraska municipality, ("City" or "Employer") maintains the City of Grand Island, Nebraska Police Officers' Retirement System Plan and Trust pursuant to Neb. Rev. Stat. Sections 16-1001 through 16-1019 and Internal Revenue Code, Sections 401(a) and 501(a), as set forth in the Adoption Agreement and corresponding Basic Municipal Employees Plan and Trust Agreement, ("Plan"), and hereby adopts and approves this Amendment No. 1 to the Plan and authorizes the Mayor or his designee to execute it below.

1.2 **Effective date of Amendment.** This Amendment is effective as indicated below for the respective provisions; provided, however, that an effective date shall not be earlier than the effective date of the Plan.

1.3 **Superseding of inconsistent provisions.** This Amendment supersedes the provisions of the Plan to the extent those provisions are inconsistent with the provisions of this Amendment.

1.4 **Construction.** Provisions of this Amendment that are applicable to a defined benefit plan are included to the extent the Plan provides a minimum defined benefit. Except as otherwise provided in this Amendment, any reference to "Article" or "Section" in this Amendment refers only to articles or sections within this Amendment, and is not a reference to the Plan.

1.5 **Effect of restatement of Plan.** If the City of Grand Island restates the Plan, then this Amendment shall remain in effect after such restatement unless the provisions in this Amendment are restated or otherwise become obsolete (e.g., if the Plan is restated into a plan document which incorporates Pension Protection Act of 2006 ("PPA"), and other provisions herein for subsequent legislation and guidance).

ARTICLE II
CITY ELECTIONS

2.1 **Applicable Provisions.** Unless the City otherwise specifies in this Amendment, the following will apply:

a. The applicable mortality table described in Amendment Section 3.3.3(c) is effective for years beginning after December 31, 2008.

b. Nonspousal beneficiary rollovers shall be permitted effective for distributions made on or after January 1, 2008.

c. In-Service distributions prior to Normal Retirement Age are not permitted.

d. Once Code Section 436 benefit restrictions no longer apply, the Amendment provides for the (1) automatic restoration of benefit accruals, and (2) no "annuity starting date"; provided, however, Code Section 436 benefit restriction provisions do not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d) and

exempt from the requirements of Code Sections 401(a)(29) and 436 by reason of being excluded from the funding requirements of Code Section 412.

e. Continued benefit accruals pursuant to the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) are not provided. Distributions upon deemed severance of employment under the HEART Act are not permitted.

f. The applicable interest rate shall be based on the first month (lookback month) prior to the Plan Year (stability period) during which a distribution is made.

2.2 **Effective date of applicable mortality table set forth in Amendment Section 3.3.3(c).** The applicable mortality table described in Amendment Section 3.3.3(c) is effective for years beginning after December 31, 2008.

2.3 **Non-spousal rollovers** (Article IV). Nonspousal beneficiary rollovers shall be permitted effective for distributions made on or after January 1, 2008.

2.4 **In-service distributions** (Article VIII). In-Service Distributions prior to Normal Retirement Age are not permitted.

2.5 **Code Section 436 Benefit Restrictions (Article XII)**

Treatment of Plan as of Close of Prohibited or Cessation Period (Section XII(h)). Unless otherwise elected below, accruals that had been limited under Code Section 436(e) will be automatically restored as of the "Section 436 measurement date" that the limitation ceases to apply; and

Accelerated Benefit Distributions (Section XII(h)). Unless otherwise elected below, (1) there is no new "annuity starting date" with respect to payments made as a result of the benefit limitations no longer being applicable, and (2) there are no optional forms of benefit that are only available for the period of the benefit restrictions;

Provided, however, the Code Section 436 benefit restriction provisions do not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d) and exempt from the requirements of Code Sections 401(a)(29) and 436 by reason of being excluded from the funding requirements of Code Section 412.

2.6 **Continued benefit accruals and distributions upon deemed severance (Article XIII).** Continued benefit accruals for the Heart Act (Amendment Section 13.2) will not apply. Further, distributions upon deemed severance of employment under the HEART Act (Amendment Section 13.4) will not be permitted.

2.7 **Applicable interest rate.** For purposes of Amendment Section 14.2, unless otherwise elected below, the stability period is the Plan Year during which a distribution is made and the lookback month is the first calendar month preceding the first day of the stability period.

ARTICLE III
PENSION FUNDING EQUITY ACT OF 2004 AS MODIFIED BY SUBSEQUENT LEGISLATION

3.1 **General Rule.** This Article applies to the determination of Code Section 415 limits.

3.1.1 **Effective date.** The City adopts this Article III to reflect certain provisions of the Pension Funding Equity Act of 2004 (PFEA), as modified by the Pension Protection Act of 2006 and the

Worker, Retiree and Employer Recovery Act of 2008. Except as otherwise provided herein, effective for distributions in Plan Years beginning after December 31, 2003, the required determination of actuarial equivalence of forms of benefit other than a straight life annuity shall be made in accordance with this Amendment. However, this Amendment does not supersede any prior election to apply the transition rule of section 101(d)(3) of PFEA as described in Notice 2004-78.

3.1.2 **Definition of "Applicable Mortality Table."** The "applicable mortality table" means the applicable mortality table within the meaning of Code Section 417(e)(3)(B) (as described in Article XIV), subject to any special effective dates specified in this Article III.

3.2 **Benefit Forms Not Subject to the Present Value Rules of Code Section 417(e)(3)**

3.2.1 **Form of benefit.** The straight life annuity that is actuarially equivalent to the Participant's form of benefit shall be determined under this Section 3.2 if the form of the Participant's benefit is either:

(a) A nondecreasing annuity (other than a straight life annuity) payable for a period of not less than the life of the Participant (or, in the case of a qualified pre-retirement survivor annuity, the life of the surviving spouse), or

(b) An annuity that decreases during the life of the Participant merely because of:

(1) The death of the survivor annuitant (but only if the reduction is not below 50% of the benefit payable before the death of the survivor annuitant), or

(2) The cessation or reduction of Social Security supplements or qualified disability payments (as defined in Code Section 401(a)(11)).

3.2.2 **Limitation Years beginning before July 1, 2007** – For Limitation Years beginning before July 1, 2007, the actuarially equivalent straight life annuity is equal to the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit computed using whichever of the following produces the greater annual amount:

(a) the interest rate and mortality table (or other tabular factor specified in the Plan for adjusting benefits in the same form; and

(b) a 5 percent interest rate assumption and the "applicable mortality table" defined in the Plan for that annuity starting date.

3.2.3 **Limitation Years beginning on or after July 1, 2007.** For Limitation Years beginning on or after July 1, 2007, the actuarially equivalent straight life annuity is equal to the greater of:

(a) The annual amount of the straight life annuity (if any) payable to the Participant under the Plan commencing at the same annuity starting date as the Participant's form of benefit; and

(b) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using a 5 percent interest rate assumption and the applicable mortality table defined in the Plan for that annuity starting date.

3.3 **Benefit Forms Subject to the Present Value Rules of Code Section 417(e)(3).**

3.3.1 **Form of benefit.** The straight life annuity that is actuarially equivalent to the Participant's form of benefit shall be determined as indicated under this Section 3.3 if the form of the Participant's benefit is other than a benefit form described in Section 3.2.1 above.

3.3.2 **Annuity Starting Date in small plans for Plan Years Beginning in 2009 and later.** Notwithstanding anything in this Amendment to the contrary, if the annuity starting date of the Participant's form of benefit is in a Plan Year beginning in or after 2009, and if the Plan is maintained by an eligible employer as defined in Code Section 408(p)(2)(C)(i), the actuarially equivalent straight life annuity is equal to the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using whichever of the following produces the greater annual amount:

(a) The interest rate and the mortality table (or other tabular factor) specified in the Plan for adjusting benefits in the same form; and

(b) A 5.5 percent interest rate assumption and the applicable mortality table described in Article XIV.

3.3.3. **Annuity Starting Date in Plan Years Beginning After 2005.** Except as provided in Section 3.3.2, if the annuity starting date of the Participant's form of benefit is in a Plan Year beginning after December 31, 2005, the actuarially equivalent straight life annuity is equal to the greatest of:

(a) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using the interest rate and the mortality table (or other tabular factor) specified in the Plan for adjusting benefits in the same form;

(b) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using a 5.5 percent interest rate assumption and the applicable mortality table for the distribution under Treasury Regulations Section 1.417(e)-1(d)(2) (determined in accordance with Article XIV for Plan Years after the effective date specified below); and

(c) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using the applicable interest rate for the distribution under Treasury Regulations Section 1.417(e)-1(d)(3) (determined in accordance with Article XIV for Plan Years after the effective date of that Article) and the applicable mortality table for the distribution under Treasury Regulations Section 1.417(e)-1(d)(2) (determined in accordance with Article XIV for Plan Years after the effective date specified below), divided by 1.05.

The effective date of the applicable mortality table above is for years beginning after December 31, 2008.

3.3.4 **Annuity Starting Date in Plan Years Beginning in 2004 or 2005** – If the annuity starting date of the Participant's form of benefit is in a Plan Year beginning in 2004 or 2005, the actuarially equivalent straight life annuity is equal to the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as

the participant's form of benefit, computed using whichever of the following produces the greater annual amount:

(a) The interest rate and the mortality table (or other tabular factor) specified in the Plan for adjusting benefits in the same form; and

(b) A 5.5 percent interest rate assumption and the applicable mortality table for the distribution under Regulations Section 1.417(e)-1(d)(2).

However, this Section does not supersede any prior election to apply the transition rule of section 101(d)(3) of PFEA as described in Notice 2004-78.

ARTICLE IV
DIRECT ROLLOVER OF NON-SPOUSAL DISTRIBUTION

4.1 **Non-spouse beneficiary rollover right (for distributions on or after January 1, 2008).** A non-spouse beneficiary who is a "designated beneficiary" under Code Section 401(a)(9)(E) and the Regulations thereunder, by a direct trustee-to-trustee transfer ("direct rollover"), may roll over all or any portion of his or her distribution to an Individual Retirement Account (IRA) the beneficiary establishes for purposes of receiving the distribution. In order to be able to roll over the distribution, the distribution otherwise must satisfy the definition of an "eligible rollover distribution" under Code Section 401(a)(31).

4.2 **Applicability of certain requirements.** For Plan Years beginning on or after January 1, 2010, any direct rollover of a distribution by a nonspouse beneficiary shall be subject to the direct rollover requirements of Code Section 401(a)(31) (including Code Section 401(a)(31)(B)), the notice requirements of Code Section 402(f) and the mandatory withholding requirements of Code Section 3405(c). Before that date, any such distribution shall not be subject to said requirements. Any distribution from the Plan to a non-spouse beneficiary shall not be eligible for a 60-day (non-direct) rollover.

4.3 **Trust beneficiary.** Subject to Section 4.1, if the Participant's named beneficiary is a trust, the Plan may make a direct rollover to an IRA on behalf of the trust, provided the trust satisfies the requirements to be a designated beneficiary within the meaning of Code Section 401(a)(9)(E).

4.4 **Required minimum distributions not eligible for rollover.** A non-spouse beneficiary is not permitted to roll over an amount that is a required minimum distribution, as determined under applicable Treasury Regulations and other Internal Revenue Service guidance. If the Participant dies before his or her required beginning date and the non-spouse beneficiary rolls over to an IRA the maximum amount eligible for rollover, the beneficiary may elect to use either the 5-year rule or the life expectancy rule, pursuant to Treasury Regulations Section 1.401(a)(9)-3, A-4(c), in determining the required minimum distributions from the IRA that receives the non-spouse beneficiary's distribution.

ARTICLE V
ROLLOVER OF AFTER-TAX AMOUNTS

5.1 **Direct rollover to qualified plan/403(b) plan (for taxable years beginning after December 31, 2006).** A Participant may elect to transfer employee after-tax contributions, if any, by means of a direct rollover to a qualified plan or to a 403(b) plan that agrees to account separately for amounts so transferred (including interest thereon), including accounting separately for the portion of such distribution which is includible in gross income and the portion of such distribution which is not includible in gross income.

ARTICLE VI
PARTICIPANT DISTRIBUTION NOTIFICATION

6.1 **180-day notification period (effective for distribution notices in Plan Years beginning after December 31, 2006).** Reference to the 90-day maximum notice period requirements of Code Sections 402(f) (the rollover notice), 411(a)(11) (Participant's consent to distribution), and 417 (notice regarding the joint and survivor annuity rules), if any, is changed to 180 days.

6.2 **Effect of delay of distribution.** Notices given to Participants pursuant to Code Section 411(a)(11) in Plan Years beginning after December 31, 2006, if any, shall include a description of the consequences of failing to defer a distribution, including (i) for any individual account balance, a description of investment options available under the Plan (including fees) that will be available if the Participant defers distribution, (ii) for any defined benefit, how much larger benefits will be if the commencement of distributions is deferred, and (iii) the portion of the summary plan description that contains any special rules that might affect materially a Participant's decision to defer.

6.3 **Explanation of relative value.** Notices to Participants shall include the relative values of the various optional forms of benefit under the Plan as provided in Treasury Regulations Section 1.417(a)-3, to the extent said Regulations are applicable to the Plan. This provision is effective as of the applicable effective date set forth in Treasury Regulations (i.e., to qualified pre-retirement survivor annuity explanations provided on or after July 1, 2004; to qualified joint and survivor annuity explanations with respect to any distribution with an annuity starting date that is on or after February 1, 2006, or on or after October 1, 2004 with respect to any optional form of benefit that is subject to the requirements of Code Section 417(e)(3) if the actuarial present value of that optional form is less than the actuarial present value as determined under Code Section 417(e)(3)). Provided, however, pursuant to the flush language of Code Section 401(a) and Code Section 411(e)(1)(B), the provisions of Code Sections 401(a)(11) and 417, and consequently this Article VI, shall not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d).

ARTICLE VII
QUALIFIED DOMESTIC RELATIONS ORDERS

7.1 **Permissible QDROs (effective on and after April 6, 2007).** For purposes of provisions of the Plan regarding domestic relations orders, if any, a domestic relations order that otherwise satisfies the requirements for a qualified domestic relations order (QDRO) will not fail to be a QDRO: (i) solely because the order is issued after, or revises, another domestic relations order or QDRO; or (ii) solely because of the time at which the order is issued, including issuance after the annuity starting date or after the Participant's death.

7.2 **Other QDRO requirements apply.** A domestic relations order described in Section 7.1 is subject to the same requirements and protections that apply to any other QDRO.

ARTICLE VIII
PRE-RETIREMENT PENSION IN-SERVICE DISTRIBUTIONS

8.1 **No age 62 in-service distributions.** As specified in Amendment Section 2.4, a Participant who has attained the specified age and who is not separated from employment may not elect to receive a distribution of his or her vested Accrued Benefit.

ARTICLE IX
QUALIFIED OPTIONAL SURVIVOR ANNUITY

9.1 **Right to Elect Qualified Optional Survivor Annuity (effective for distributions with annuity starting dates in Plan Years beginning after December 31, 2007).** A Participant who elects to waive the qualified joint and survivor annuity form of benefit under the Plan, if provided for under the Plan, shall be entitled to elect the "qualified optional survivor annuity" at any time during the applicable election period. Furthermore, the written explanation of the joint and survivor annuity, if required, shall explain the terms and conditions of the "qualified optional survivor annuity." Provided, however, the following rules apply in the specified circumstances:

(a) **Special Effective Date Rules.**

1. If the Plan permits retroactive annuity starting dates and a Participant elects a distribution with a retroactive annuity starting date (pursuant to Treasury Regulations Section 1.417(e)-1(b)(3)(iv)) that is before the aforementioned effective date, the date of the first actual payment of benefits based on the retroactive annuity starting date is substituted for the annuity starting date for purposes of applying the rules of this paragraph.

2. In the case of a plan that is subject to Code Section 401(a)(11) and that is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified on or before August 17, 2006 (the date of enactment of PPA '06), the changes to Code Section 417 made by Section 1004 of PPA '06 apply to distributions with annuity starting dates during plan years beginning on or after the earlier of (i) January 1, 2008 or, if later, the date on which the last collective bargaining agreement related to the plan terminates (determined without regard to any extensions to a collective bargaining agreement made after August 17, 2006), or (ii) January 1, 2009.

(b) **Inapplicability to Governmental Plans.** Pursuant to the flush language of Code Section 401(a) and the provisions of Code Section 411(e)(1)(A), the provisions of Code Sections 401(a)(11) and 417, and consequently this Article IX, shall not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d).

9.2 **Definition of Qualified Optional Survivor Annuity.**

(a) For purposes of this Article, the term "qualified optional survivor annuity" means an annuity:

(1) For the life of the Participant with a survivor annuity for the life of the Participant's spouse which is equal to the "applicable percentage" of the amount of the annuity which is payable during the joint lives of the Participant and the Participant's spouse, and

(2) Which is the actuarial equivalent of a single annuity for the life of the Participant.

Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

(b) For purposes of this Section, the "applicable percentage" is based on the survivor annuity percentage (i.e., the percentage which the survivor annuity under the Plan's qualified joint and survivor annuity bears to the annuity payable during the joint lives of the Participant and the spouse). If the survivor annuity percentage is less than seventy-five percent (75%), then the "applicable percentage" is seventy-five percent (75%). If the

survivor annuity percentage is equal to or greater than seventy-five percent (75%), the "applicable percentage" is fifty percent (50%).

ARTICLE X
DIRECT ROLLOVER TO ROTH IRA

10.1 **Roth IRA rollover.** For distributions made after December 31, 2007, a Participant or beneficiary may elect to roll over directly an "eligible rollover distribution" to a Roth IRA described in Code Section 408A(b); provided, however, for taxable years beginning before January 1, 2010, an individual cannot make a qualified rollover contribution from an eligible retirement plan other than a Roth IRA if, for the year the eligible rollover distribution is made, he or she has modified adjusted gross income exceeding $100,000 or is married and files a separate return. For this purpose, the term "eligible rollover distribution" includes a rollover distribution described in Article V, if applicable.

ARTICLE XI
TOP-HEAVY PROVISIONS

11.1 **Severance from employment.** Effective for any Plan Year beginning after December 31, 2001, any provisions of the Plan setting forth the top-heavy provisions of Code Section 416 are modified by substituting the term "separation from service" with "severance from employment."

ARTICLE XII
BENEFIT RESTRICTIONS

(a) **Effective Date and Application of Article.**

(1) Effective Date. The provisions of this Article apply to Plan Years beginning after December 31, 2007.

(2) This Article only applies to single employer plans (a plan that is not a multiemployer plan within the meaning of Code Section 414(f)) and does not apply to a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers.

(A) Multiple Employer Plans. In the case of a multiple employer plan to which Code Section 413(c)(4)(A) applies, Code Section 436 applies separately with respect to each employer under the plan, as if each employer maintained a separate plan. Thus, the benefit limitations under Code Section 436 could apply differently to participants who are employees of different employers under such a multiple employer plan. In the case of a multiple employer plan to which Code Section 413(c)(4)(A) does not apply (that is, a plan described in Code Section 413(c)(4)(B) that has not made the election for Code Section 413(c)(4)(A) to apply), Code Section 436 applies as if all participants in the plan were employed by a single employer.

(B) Governmental Plans. Code Section 436 benefit restrictions and other provisions described in this Article do not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d) and exempt from the requirements of Code Sections 401(a)(29) and 436 by reason of being exempt from the funding requirements of Code Section 412.

(3) The limitations described in Subsections (b), (c) and (e) do not apply to the Plan for the first five (5) Plan Years of the Plan. Except as otherwise provided by the Commissioner in guidance of general applicability, the Plan Years taken into account for this purpose include the following (in addition to Plan Years during which the Plan was maintained by the Employer):

(A) Plan Years when the Plan was maintained by a predecessor employer within the meaning of Regulations Section 1.415(f)-1(c)(1);

(B) Plan years of another defined benefit plan maintained by a predecessor employer within the meaning of Regulations Section 1.415(f)-1(c)(2) within the preceding five years if any Participants in the Plan participated in that other defined benefit plan (even if the Plan maintained by the Employer is not the plan that was maintained by the predecessor employer); and

(C) Plan years of another defined benefit plan maintained by the Employer within the preceding five years if any Participants in the Plan participated in that other defined benefit plan.

(4) Notwithstanding anything in this Article to the contrary, the provision of Code Section 436 and the Regulations thereunder are incorporated herein by reference.

(5) For Plans that have a valuation date other than the first day of the Plan Year, the provisions of Code Section 436 and this Article will be applied in accordance with Regulations.

(b) **Funding-Based Limitation on Shutdown Benefits and Other Unpredictable Contingent Event Benefits**

(1) In general. If a Participant is entitled to an "unpredictable contingent event benefit" payable with respect to any event occurring during any Plan Year, then such benefit may not be provided if the "adjusted funding target attainment percentage" for such Plan Year (A) is less than sixty percent (60%) or, (B) sixty percent (60%) or more, but would be less than sixty percent (60%) percent if the "adjusted funding target attainment percentage" were redetermined applying an actuarial assumption that the likelihood of occurrence of the "unpredictable contingent event" during the Plan Year is one hundred percent (100%).

(2) Exemption. Paragraph (1) shall cease to apply with respect to any Plan Year, effective as of the first day of the Plan Year, upon payment by the Employer of the contribution described in Regulations Section 1.436-1(f)(2)(iii).

(c) **Limitations on Plan Amendments Increasing Liability for Benefits**

(1) In general. No amendment which has the effect of increasing liabilities of the Plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable may take effect during any Plan Year if the "adjusted funding target attainment percentage" for such Plan Year is:

(A) less than eighty percent (80%), or

(B) eighty percent (80%) or more, but would be less than eighty percent (80%) if the benefits attributable to the amendment were taken into account in determining the "adjusted funding target attainment percentage."

(2) Exemption. Paragraph (c)(1) above shall cease to apply with respect to a Plan amendment upon payment by the Employer of the contribution described in Regulations Section 1.436-1(f)(2)(iv).

(3) Exception for certain benefit increases. Paragraph (1) shall not apply to any amendment as otherwise provided in Regulations Section 1.436-1(c).

(d) **Limitations on Prohibited Payments**

(1) Funding percentage less than sixty percent (60%). If the Plan's "adjusted funding target attainment percentage" for a Plan Year is less than sixty percent (60%), then a Participant or Beneficiary shall not be permitted to elect, and the Plan may not pay, any "prohibited payment" with an "annuity starting date" on or after the applicable "Section 436 measurement date."

(2) Bankruptcy. A Participant or Beneficiary shall not be permitted to elect, and the Plan may not pay, any "prohibited payment" with an "annuity starting date" that occurs during any period in which the Employer is a debtor in a case under Title 11, United States Code, or similar Federal or State law. The preceding sentence shall not apply to payments made within a Plan Year with an "annuity starting date" that occurs on or after the date on which the enrolled actuary of the Plan certifies that the "adjusted funding target attainment percentage" of the Plan is not less than one hundred percent (100%).

(3) Limited payment if percentage at least sixty percent (60%) but less than eighty percent (80%) percent.

(A) In general. If the Plan's "adjusted funding target attainment percentage" for a Plan Year is sixty percent (60%) or greater but less than eighty percent (80%), then a Participant or Beneficiary shall not be permitted to elect, and the Plan may not pay, any "prohibited payment" with an "annuity starting date" on or after the applicable "Section 436 measurement date," unless the present value (determined in accordance with Code Section 417(e)(3)) of the portion of the benefit that is being paid in a "prohibited payment" (which portion is determined under paragraph (C)(i) below) does not exceed the lesser of:

(i) fifty (50) percent of the amount of the present value (determined in accordance with Code Section 417(e)(3)) of the benefit payable in the optional form of benefit that includes the prohibited payment; or

(ii) 100% of the "PBGC maximum benefit guarantee amount."

(B) Bifurcation if optional form unavailable.

(i) Requirement to offer bifurcation. If an optional form of benefit that is otherwise available under the terms of the plan is not available as of the "annuity starting date" because of the application of Regulations Section 1.436-1(d)(3)(i), then the Participant or Beneficiary may elect to:

(1) Receive the unrestricted portion of that optional form of benefit (determined under the rules of Regulations Section 1.436-1(d)(3)(iii)(D)) at that "annuity starting date," determined by treating the unrestricted portion of the benefit as if it were the Participant's or Beneficiary's entire benefit under the plan;

(2) Commence benefits with respect to the Participant's or Beneficiary's entire benefit under the Plan in any other optional form of benefit available under the Plan at the same "annuity starting date" that satisfies Regulations Section 1.436-1(d)(3)(i); or

(3) Defer commencement of the payments to the extent described in Regulations Section 1.436-1(d)(5).

(ii) Rules relating to bifurcation. If the Participant or Beneficiary elects payment of the unrestricted portion of the benefit as described in Regulations Section 1.436-1(d)(3)(ii)(A)(1), then the Participant or Beneficiary may elect payment of the remainder of the Participant's or Beneficiary's benefits under the Plan in any optional form of benefit at that "annuity starting date" otherwise available under the Plan that would not have included a "prohibited payment" if that optional form applied to the entire benefit of the Participant or Beneficiary. The rules of Regulations Section 1.417(e)-1 are applied separately to the separate optional forms for the "unrestricted portion of the benefit" and the remainder of the benefit (the restricted portion).

(iii) Plan alternative that anticipates election of payment that includes a "prohibited payment." With respect to every optional form of benefit that includes a "prohibited payment" and that is not permitted to be paid under Regulations Section 1.436-1 (d)(3)(i), for which no additional information from the Participant or Beneficiary (such as information regarding a Social Security leveling optional form of benefit) is needed to make that determination, rather than wait for the Participant or Beneficiary to elect such optional form of benefit, the Plan will provide for separate elections with respect to the restricted and unrestricted portions of that optional form of benefit.

(C) Definitions applicable to limited payment option. The following definitions apply for purposes of this subsection (d)(3).

(i) Portion of benefit being paid in a prohibited payment. If a benefit is being paid in an optional form for which any of the payments is greater than the amount payable under a straight life annuity to the Participant or Beneficiary (plus any Social Security supplements described in the last sentence of Code Section 411(a)(9) payable to the Participant or Beneficiary) with the same "annuity starting date," then the portion of the benefit that is being paid in a "prohibited payment" is the excess of each payment over the smallest payment during the Participant's lifetime under the optional form of benefit (treating a period after the "annuity starting date" and during the Participant's lifetime in which no payments are made as a payment of zero).

(ii) PBGC maximum benefit guarantee amount. The "PBGC maximum benefit guarantee amount" is the present value (determined under guidance prescribed by the Pension Benefit Guaranty Corporation, using the interest and mortality assumptions under Code Section 417(e)) of the maximum benefit guarantee with respect to a Participant (based on the Participant's age or the Beneficiary's age at the "annuity starting date") under ERISA Section 4022 for the year in which the "annuity starting date" occurs.

(iii) Unrestricted portion of the benefit:

(1) General rule. Except as otherwise provided in this paragraph (iii), the unrestricted portion of the benefit with respect to any optional form of benefit is fifty percent (50%) of the amount payable under the optional form of benefit.

(2) Special rule for forms which include Social Security leveling or a refund of employee contributions. For an optional form of benefit that is a prohibited payment on account of a Social Security leveling feature (as defined in Regulations Section 1.411(d)-3(g)(16)) or a refund of

employee contributions feature (as defined in Regulations Section 1.411(d)-3(g)(11)), the unrestricted portion of the benefit is the optional form of benefit that would apply if the Participant's or Beneficiary's Accrued Benefit were fifty percent (50%) smaller.

(3) Limited to PBGC maximum benefit guarantee amount. After the application of the preceding rules of this paragraph (iii), the unrestricted portion of the benefit with respect to the optional form of benefit is reduced, to the extent necessary, so that the present value (determined in accordance with Code Section 417(e)) of the unrestricted portion of that optional form of benefit does not exceed the "PBGC maximum benefit guarantee amount."

(D) Other Rules.

(i) One time application. If a Participant with respect to whom a prohibited payment (or a series of prohibited payments under a single optional form of benefit) is made pursuant to paragraph (d)(3)(A) or (B) above, no additional prohibited payment may be made with respect to that Participant during any consecutive Plan Years for which prohibited payments are limited under this subsection (d).

(ii) Treatment of beneficiaries. For purposes of this subparagraph (d)(3), benefits provided with respect to a Participant and any Beneficiary of the Participant (including an alternate payee, as defined in Code Section 414(p)(8)) are aggregated. If the only benefits paid under the plan with respect to the Participant are death benefits payable to the Beneficiary, then paragraph (d)(3)(C)(i) of this section is applied by substituting the lifetime of the Beneficiary for the lifetime of the Participant. If the Accrued Benefit of a Participant is allocated to such an alternate payee and one or more other persons, then the "unrestricted amount" of (d)(3)(C)(iii) is allocated among such persons in the same manner as the accrued benefit is allocated, unless a qualified domestic relations order (as defined in Code Section 414(p)(1)(A)) with respect to the Participant or the alternate payee provides otherwise.

(iii) Treatment of annuity purchases and plan transfers. This paragraph (d)(3)(D)(iii) applies for purposes of applying subsections (d)(3)(A) and (d)(3)(C)(iii). In the case of a prohibited payment described in Regulations Section 1.436-1(j)(6)(i)(B) (relating to purchase from an insurer), the present value of the portion of the benefit that is being paid in a prohibited payment is the cost to the plan of the irrevocable commitment and, in the case of a prohibited payment described in Regulations Section 1.436-1(j)(6)(i)(C) (relating to certain plan transfers), the present value of the portion of the benefit that is being paid in a prohibited payment is the present value of the liabilities transferred (determined in accordance with Code Section 414(l)). In addition, the present value of the accrued benefit is substituted for the present value of the benefit payable in the optional form of benefit that includes the prohibited payment in Regulations Section 1.436-1(d)(3)(i)(A).

(4) Exception. This subsection (d) shall not apply for any Plan Year if the terms of the Plan (as in effect for the period beginning on September 1, 2005, and ending with such Plan Year) provide for no benefit accruals with respect to any Participant during such period.

(5) Right to delay commencement. If a Participant or Beneficiary requests a distribution in an optional form of benefit that includes a "prohibited payment" that is not permitted to be paid under paragraph (d)(1), (d)(2), or (d)(3) of this Article, then the Participant retains the right to delay commencement of benefits in accordance with the terms of the plan and applicable qualification requirements (such as Code Sections 411(a)(11) and 401(a)(9)).

(6) "Prohibited payment." For purposes of this subsection (d), the term "prohibited payment" means:

(A) Any payment for a month that is in excess of the monthly amount paid under a single life annuity (plus any Social Security supplements described in the last sentence of Code Section 411(a)(9)), to a Participant or Beneficiary whose "annuity starting date" occurs during any period a limitation under paragraph (d) is in effect;

(B) Any payment for the purchase of an irrevocable commitment from an insurer to pay benefits; and

(C) Any transfer of assets and liabilities to another plan maintained by the same Employer (or by any member of the Employer's controlled group) that is made in order to avoid or terminate the application of Code Section 436 benefit limitations; and

(D) Any other amount that is identified as a prohibited payment by the Commissioner in revenue rulings and procedures, notices, and other guidance published in the Internal Revenue Bulletin.

Such term shall not include the payment of a benefit which under Code Section 411(a)(11) may be immediately distributed without the consent of the Participant. Furthermore, in the case of a Beneficiary that is not an individual, the amount that is a prohibited payment is determined by substituting the monthly amount payable in installments over 240 months that is actuarially equivalent to the benefit payable to the Beneficiary, as provided in Regulations Section 1.436-1(j)(6)(ii).

(e) **Limitation on Benefit Accruals for Plans with Severe Funding Shortfalls**

(1) In general. If the Plan's "adjusted funding target attainment percentage" for a Plan Year is less than sixty percent (60%), benefit accruals under the Plan shall cease as of the "section 436 measurement date." If the Plan is required to cease benefit accruals under this subsection (e), then the Plan is not permitted to be amended in a manner that would increase the liabilities of the Plan by reason of an increase in benefits or establishment of new benefits. The preceding sentence applies regardless of whether an amendment would otherwise be permissible under subsections (c)(2) or (c)(3) of this Article.

(2) Exemption. Paragraph (1) shall cease to apply with respect to any Plan Year, effective as of the first day of the Plan Year, upon payment by the Employer of the contribution described in Regulations Section 1.436-1(f)(2)(v).

(3) Temporary modification of limitation. In the case of the first Plan Year beginning during the period beginning on October 1, 2008, and ending on September 30, 2009, the provisions of (e)(1) above shall be applied by substituting the Plan's "adjusted funding target attainment percentage" for the preceding Plan Year for such percentage for such Plan Year, but only if the "adjusted funding target attainment percentage" for the preceding year is greater.

(f) **Rules Relating to Contributions Required to Avoid or Terminate Benefit Limitations**

The application of the Code Section 436 benefit limitations may be avoided or terminated in accordance with any of the rules set forth in Code Section 436 and Regulations Section 1.436-1(f).

(g) **Presumed Underfunding for Purposes of Benefit Limitations**

(1) Presumption of continued underfunding.

(A) In general. This paragraph (g)(1) applies to a Plan for a Plan Year if a limitation under subsection (b), (c), (d), or (e) applied to the Plan on the last day of the preceding Plan Year. If this paragraph (g)(1) applies to a Plan, then the first day of the Plan Year is a "Section 436 measurement date" and the presumed "adjusted funding target attainment percentage" for the Plan is the percentage under paragraph (g)(1)(B) or (C) of this subsection, whichever applies to the Plan, beginning on that first day of the Plan Year and ending on the date specified in subparagraph (g)(1)(D) of this section.

(B) Rule where preceding year certification issued during preceding year.

(i) General rule. In any case in which the Plan's enrolled actuary has issued a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" for the Plan Year preceding the current Plan Year before the first day of the current Plan Year, the presumed "adjusted funding target attainment percentage" of the Plan for the current Plan Year is equal to the prior Plan Year "adjusted funding target attainment percentage" until it is changed under Regulations Section 1.436-1(h)(1)(iv).

(ii) Special rule for late certifications. If the certification of the adjusted funding target attainment percentage for the prior Plan Year occurred after the first day of the 10th month of that prior Plan Year, the Plan is treated as if no such certification was made, unless the certification took into account the effect of any unpredictable contingent event benefits that are permitted to be paid based on unpredictable contingent events that occurred, and any Plan amendments that became effective, during the prior Plan Year but before the certification (and any associated Code Section 436 contributions).

(C) No certification for preceding year issued during preceding year.

(i) Deemed percentage continues. In any case in which the Plan's enrolled actuary has not issued a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" of the Plan for the Plan Year preceding the current Plan Year during that prior Plan Year, the presumed "adjusted funding target attainment percentage" of the Plan for the current Plan Year is equal to the presumed "adjusted funding target attainment percentage" that applied on the last day of the preceding Plan Year until the presumed "adjusted funding target attainment percentage" is changed under Regulations Section 1.436-1(h)(1)(iii)(B) or (h)(1)(iv).

(ii) Enrolled actuary's certification in following year. In any case in which the Plan's enrolled actuary has issued the certification under Regulations Section 1.436-1(h)(4) of the adjusted funding target attainment percentage of the Plan for the Plan Year preceding the current Plan Year on or after the first day of the current Plan Year, the date of that prior Plan Year certification is a new "Section 436 measurement date" for the current Plan Year. In such a case, the presumed

adjusted funding target attainment percentage for the current Plan Year is equal to the prior Plan Year adjusted funding target attainment percentage (reduced by 10 percentage points if Regulations Section 1.436-1(h)(2)(iv) applies to the Plan) until it is changed under Regulations Section 1.436-1(h)(1)(iv). The rules of Regulations Section 1.436-1(h)(1)(ii)(B) apply for purposes of determining whether the enrolled actuary has issued a certification of the adjusted funding target attainment percentage for the prior Plan Year during the current Plan Year.

(D) Duration of use of presumed "adjusted funding target attainment percentage." If this paragraph (g)(1) applies to a Plan for a Plan Year, then the presumed "adjusted funding target attainment percentage" determined under this paragraph (g)(1) applies until the earliest of:

(i) The first day of the 4th month of the Plan Year if paragraph (g)(2) of this section applies;

(ii) The first day of the 10th month of the Plan Year if paragraph (g)(3) of this section applies;

(iii) The date of a change in the presumed adjusted funding target attainment percentage under Regulations Section 1.436-1(g)(4); or

(iv) The date the enrolled actuary issues a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" for the Plan Year.

(2) Presumption of underfunding beginning on first day of 4th month for certain underfunded plans. This paragraph (2) applies to a Plan for a Plan Year if the enrolled actuary for the Plan has not issued a certification of the "adjusted funding target attainment percentage" for the Plan Year before the first day of the 4th month of the Plan Year, and the Plan's "adjusted funding target attainment percentage" for the preceding Plan Year was either (1) at least sixty percent (60%) but less than seventy percent (70%); or (2) at least eighty percent (80%) but less than ninety percent (90%). This paragraph (2) also applies to a Plan for the first effective Plan Year if the enrolled actuary for the Plan has not issued a certification of the "adjusted funding target attainment percentage" for the Plan Year before the first day of the 4th month of the Plan Year, and the prior Plan Year "adjusted funding target attainment percentage" is at least seventy percent (70%) but less than eighty percent (80%).

(A) Presumed adjusted funding target attainment percentage. Application of this paragraph. If this paragraph (2) applies to a Plan for a Plan Year and the date of the enrolled actuary's certification of the "adjusted funding target attainment percentage" under Regulations Section 1.436-1(h)(4) for the prior Plan Year (taking into account the special rules for late certifications under Regulations Section 1.436-1(h)(1)(ii)(B)) occurred before the first day of the 4th month of the current Plan Year, then, commencing on the first day of the 4th month of the current Plan Year:

(i) The presumed "adjusted funding target attainment percentage" of the Plan for the Plan Year is reduced by 10 percentage points; and

(ii) The first day of the 4th month of the Plan Year is a "Section 436 measurement date."

(B) Certification for prior Plan Year. If this paragraph (2) applies to a Plan and the date of the enrolled actuary's certification of the "adjusted funding target attainment

percentage" under Regulations Section 1.436-1(h)(4) for the prior Plan Year (taking into account the rules for late certifications under Regulations Section 1.436-1(h)(1)(ii)(B)) occurs on or after the first day of the 4th month of the current Plan Year, then, commencing on the date of that prior Plan Year certification:

(i) The presumed "adjusted funding target attainment percentage" of the Plan for the current Plan Year is equal to 10 percentage points less than the prior Plan Year "adjusted funding target attainment percentage"; and

(ii) The date of the prior Plan Year certification is a "Section 436 measurement date."

(C) Duration of use of presumed "adjusted funding target attainment percentage." If this paragraph (2) applies to a Plan for a Plan Year, the presumed adjusted funding target attainment percentage determined under this paragraph (2) applies until the earliest of:

(i) The first day of the 10th month of the Plan Year if paragraph (3) of this section applies;

(ii) The date of a change in the presumed "adjusted funding target attainment percentage" under Regulations Section 1.436-1(g)(4); or

(iii) The date the enrolled actuary issues a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" for the Plan Year.

(3) Presumption of underfunding beginning on first day of 10th month. In any case in which no certification of the specific adjusted funding target attainment percentage for the current Plan Year under Regulations Section 1.436-1(h)(4) is made with respect to the Plan before the first day of the 10th month of the Plan Year, then, commencing on the first day of the 10th month of the current Plan Year:

(A) The presumed "adjusted funding target attainment percentage" of the Plan for the Plan Year is presumed to be less than sixty percent (60%); and

(B) The first day of the 10th month of the Plan Year is a "Section 436 measurement date."

(h) **Treatment of Plan as of Close of Prohibited or Cessation Period.**

(1) Application to prohibited payments and accruals.

(A) Resumption of prohibited payments. If a limitation on prohibited payments under Section (d) of this Article applied to a Plan as of a "Section 436 measurement date," but that limit no longer applies to the Plan as of a later "Section 436 measurement date," then the limitation on prohibited payments under the Plan does not apply to benefits with "annuity starting dates" that are on or after that later "Section 436 measurement date." Any amendment to eliminate an optional form of benefit that contains a prohibited payment with respect to an "annuity starting date" during a period in which the limitations of Code Section 436(d) and Regulations Section 1.436-1(d) do not apply to the Plan is subject to the rules of Code Section 411(d)(6).

(B) Resumption of benefit accruals. If a limitation on benefit accruals under Regulations Section 1.436-1(e) applied to a Plan as of a "Section 436 measurement date,"

but that limit no longer applies to the Plan as of a later "Section 436 measurement date," then that limitation does not apply to benefit accruals that are based on service on or after that later "Section 436 measurement date," except to the extent that the Plan provides that benefit accruals will not resume when the limitation ceases to apply. The Plan will comply with the rules relating to partial years of participation and the prohibition on double proration under Department of Labor regulation 29 CFR Section 2530.204-2(c) and (d).

(2) Restoration of options and missed benefit accruals. If elected at Amendment Section 2.5, then Participants who had an "annuity starting date" within a period during which a limitation under Regulations Section 1.436-1(d) applied to the Plan will be provided with the opportunity to have a new "annuity starting date" (which would constitute a new "annuity starting date" under Code Sections 415 and 417) under which the form of benefit previously elected may be modified, subject to applicable qualification requirements, once the limitations of Regulations Section 1.436-1(d) cease to apply. In addition, subject to the rules of Regulations Section 1.436-1(c)(3) and any election made at Amendment Section 2.5, the Plan will automatically restore benefit accruals that had been limited under Code Section 436(e) as of the "Section 436 measurement date" that the limitation ceases to apply.

(3) Shutdown and other unpredictable contingent event benefits. If unpredictable contingent event benefits with respect to an unpredictable contingent event that occurs during the Plan Year are not permitted to be paid after the occurrence of the event because of the limitations of Code Section 436(b) and Regulations Section 1.436-1(b), but are permitted to be paid later in the Plan Year as a result of additional contributions under Regulations Section 1.436-1(f)(2) or pursuant to the enrolled actuary's certification of the "adjusted funding target attainment percentage" for the Plan Year that meets the requirements of Regulations Section 1.436-1(g)(5)(ii)(B), then those unpredictable contingent event benefits must automatically become payable, retroactive to the period those benefits would have been payable under the terms of the Plan (other than Plan terms implementing the requirements of Code Section 436(b)). If the benefits do not become payable during the Plan Year in accordance with the preceding sentence, then the Plan is treated as if it does not provide for those benefits. However, all or any portion of those benefits can be restored pursuant to a Plan amendment that meets the requirements of Code Section 436(c) and Regulations Section 1.436-1(c) and other applicable qualification requirements.

(4) Treatment of Plan amendments that do not take effect. If a Plan amendment does not take effect as of the effective date of the amendment because of the limitations of Code Section 436(c) and Regulations Section 1.436-1, but is permitted to take effect later in the Plan Year as a result of additional contributions under paragraph Regulations Section 1.436-1(f)(2) or pursuant to the enrolled actuary's certification of the "adjusted funding target attainment percentage" for the Plan Year that meets the requirements of paragraph Regulations Section 1.436-1(g)(5)(ii)(C), then the Plan amendment must automatically take effect as of the first day of the Plan Year (or, if later, the original effective date of the amendment). If the Plan amendment cannot take effect during the Plan Year, then it must be treated as if it were never adopted, unless the Plan amendment provides otherwise.

(i) **Definitions.** Defined terms shall have the meaning set forth below and as contained in Regulations Section 1.436-1(j) and shall be interpreted consistent with said Regulations.

(1) The term "adjusted funding target attainment percentage" means the "funding target attainment percentage" per paragraph (A) below, and increasing each of the amounts under subparagraphs (A) and (B) of Code Section 430(d)(2) by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in Code Section 414(q)) which were made by the Plan during the preceding two (2) Plan Years.

(A) The term "funding target attainment percentage" has the same meaning given such term by Code Section 430(d)(2) and the Regulations thereunder, except as otherwise provided herein. However, in the case of Plan Years beginning in 2008, the "funding target attainment percentage" for the preceding Plan Year may be determined using such methods of estimation as the Secretary may provide.

(B) Application to plans which are fully funded without regard to reductions for funding balances.

(1) In general. In the case of a Plan for any Plan Year, if the "funding target attainment percentage" is one hundred percent (100%) or more (determined without regard to the reduction in the value of assets under Code Section 430(f)(4)), the "funding target attainment percentage" for purposes of paragraphs (1) and (1)(A) above shall be determined without regard to such reduction.

(2) Transition rule. Subparagraph (B)(1) shall be applied to Plan Years beginning after 2007 and before 2011 by substituting for "one hundred percent (100%)" the applicable percentage determined in accordance with the following table:

In the case of a Plan Year beginning in calendar year:	The applicable percentage is:
2008	92%
2009	94%
2010	96%

(3) Subparagraph (B)(2) shall not apply with respect to the current Plan Year unless the "funding target attainment percentage" (determined without regard to the reduction in the value of assets under Code Section 430(f)(4)) of the Plan for each preceding Plan Year beginning after 2007 and before the current Plan Year was not less than the applicable percentage with respect to such preceding Plan Year determined under subparagraph (B)(2).

(2) Section 436 measurement date. A "Section 436 measurement date" is the date that is used to determine when the limitations of Code Sections 436(d) and 436(e) apply or cease to apply, and is also used for calculations with respect to applying the limitations of Sections (b) and (c) of this Article.

(3) Annuity starting date. The term "annuity starting date" means the annuity starting date as defined in Regulations Section 1.436-1(j)(2).

(4) Unpredictable contingent event benefit. The term "unpredictable contingent event benefit" means an unpredictable contingent event as defined in Regulations Section 1.436-1(j)(9).

ARTICLE XIII
HEART ACT PROVISIONS

13.1 **Death benefits.** In the case of a death occurring on or after January 1, 2007, if a Participant dies while performing qualified military service (as defined in Code Section 414(u)), the Participant's Beneficiary is entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the Plan as if the Participant had resumed and then terminated employment on account of death. Moreover, the Plan will credit the Participant's

qualified military service as service for vesting purposes, as though the Participant had resumed employment under USERRA immediately prior to the Participant's death.

13.2 **Benefit accrual.** If, pursuant to Amendment Section 2.6, the City elects to apply this Section 13.2, then effective on or after the effective date specified in Section 2.6, for benefit accrual purposes, the Plan treats an individual who dies or becomes disabled (as defined under the terms of the plan) while performing qualified military service with respect to the employer as if the individual had resumed employment in accordance with the individual's reemployment rights under USERRA, on the day preceding death or disability (as the case may be) and terminated said employment on the actual date of death or disability.

(a) **Determination of benefits.** The Plan will determine the amount of employee contributions, if any, of an individual treated as reemployed under this Section 13.2 for purposes of applying Code Section 414(u)(8)(C) on the basis of the individual's average actual employee contributions for the lesser of: (i) the 12-month period of service with the employer immediately prior to qualified military service; or (ii) if service with the employer is less than such 12-month period, the actual length of continuous service with the employer.

13.3 **Differential wage payments.** For years beginning after December 31, 2008:

(i) an individual receiving a differential wage payment, as defined by Code Section 3401(h)(2), shall be treated as an employee of the employer making the payment,

(ii) the differential wage payment shall be treated as compensation for purposes of Code Section 415(c)(3) and Regulations Section 1.415(c)-2 (e.g. for purposes of Code Section 415, top heavy provisions of Code Section 416 and determination of highly compensated employees under Code Section 414(q)), and

(iii) the Plan shall not be treated as failing to meet the requirements of any provision described in Code Section 414(u)(1)(C) (or any corresponding plan provisions, including, but not limited to, Plan provisions related to the average deferral percentage or average contribution percentage, to the extent applicable) by reason of any contribution or benefit which is based on the differential wage payment. Differential wage payments (as described herein) shall constitute compensation for all Plan purposes.

(a) **Nondiscrimination Requirements.** Provided, however, for purposes of subparagraph (iii), all employees of the employer (as determined under Code Section 414(b), (c), (m) and (o)) performing service in the uniformed services described in Code Section 3401(h)(2)(A) shall be entitled to receive differential wage payments on reasonably equivalent terms and, if eligible to participate in a retirement plan maintained by the employer, to make contributions, if contributions are permitted, based on the payments on reasonably equivalent terms (taking into account the provisions of Code Section 410(b)(3), (4) and (5) to the extent applicable).

13.4 **Deemed Severance.** As provided in Section 2.6, the Plan does not permit distribution upon deemed severance of employment.

ARTICLE XIV
CHANGE IN APPLICABLE INTEREST RATE AND APPLICABLE MORTALITY ASSUMPTION

14.1 **Effective date.** Except as provided in regulations or other guidance by the Pension Benefit Guaranty Corporation (PBGC) and IRS, to the extent said regulations or guidance is applicable to

this Plan, the limitations of this Article shall first apply in determining the amount payable to a Participant having an annuity starting date in a Plan Year beginning on or after January 1, 2008.

14.2 **Applicable interest rate.** For purposes of the Plan's provisions relating to the calculation of the present value of a benefit payment that is subject to Code Section 417(e), as well as any other Plan provision referring directly or indirectly to the "applicable interest rate" or "applicable mortality table" used for purposes of Code Section 417(e), any provision prescribing the use of the annual rate of interest on 30-year U.S. Treasury securities shall be implemented by instead using the rate of interest determined by the applicable interest rate described by Code Section 417(e) after its amendment by PPA. Specifically, the applicable interest rate shall be the adjusted first, second, and third segment rates applied under the rules similar to the rules of Code Section 430(h)(2)(C) for the calendar month (lookback month) before the first day of the Plan Year in which the annuity starting date occurs (stability period). For this purpose, the first, second, and third segment rates are the first, second, and third segment rates which would be determined under Code Section 430(h)(2)(C) if:

(a) Code Section 430(h)(2)(D) were applied by substituting the average yields for the month described in the preceding paragraph for the average yields for the 24-month period described in such section, and

(b) Code Section 430(h)(2)(G)(i)(II) were applied by substituting "Section 417(e)(3)(A)(ii)(II)" for "Section 412(b)(5)(B)(ii)(II)," and

(c) The applicable percentage under Code Section 430(h)(2)(G) is treated as being 20% in 2008, 40% in 2009, 60% in 2010, and 80% in 2011.

14.3 **Applicable mortality assumption.** For purposes of the Plan's provisions relating to the calculation of the present value of a benefit payment that is subject to Code Section 417(e), as well as any other Plan provision referring directly or indirectly to the "applicable interest rate," any Plan provision directly or indirectly prescribing the use of the mortality table described in Revenue Ruling 2001-62 shall be amended to prescribe the use of the applicable annual mortality table within the meaning set forth in Code Section 417(e)(3)(B), as initially described in Revenue Ruling 2007-67.

ARTICLE XV
2009 REQUIRED MINIMUM DISTRIBUTIONS
(IRC SECTION 401(a)(9)(H))

15.1 Notwithstanding anything in the Plan to the contrary:

(a) **Suspension of Required Minimum Distributions for 2009.** A Participant or Beneficiary who would have been required to receive required minimum distributions for 2009 but for the enactment of Code Section 401(a)(9)(H) ("2009 RMDs"), and who would have satisfied that requirement by receiving distributions that are (i) equal to the 2009 RMDs or (ii) one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the Participant, the joint lives (or joint life expectancy) of the Participant and the Participant's designated "Beneficiary, or for a period of at least 10 years ("Extended 2009 RMDs"), will not receive those distributions for 2009 unless the Participant or Beneficiary chooses to receive such distributions. Participants and Beneficiaries described in the preceding sentence will be given the opportunity to elect to receive the distributions described in the preceding sentence; and

(b) **Direct Rollovers.** For purposes of applying the direct rollover provisions of the Plan, a direct rollover will be offered only for distributions that would be eligible rollover distributions without regard to Code Section 401(a)(9)(H).

This amendment is hereby executed this _____ day of _____, 2011.

CITY OF GRAND ISLAND, a Nebraska municipality

By: _____
_____, Mayor

CITY OF GRAND ISLAND, NEBRASKA FIREFIGHTERS' RETIREMENT SYSTEM PLAN AND TRUST ("PLAN")

AMENDMENT NO. 1

ARTICLE I
PREAMBLE

1.1 **Plan and amendment authority.** The City of Grand Island, a Nebraska municipality, ("City" or "Employer") maintains the City of Grand Island, Nebraska Firefighters' Retirement System Plan and Trust pursuant to Neb. Rev. Stat. Sections 16-1020 through 16-1042 and Internal Revenue Code, Sections 401(a) and 501(a), as set forth in the Adoption Agreement and corresponding Basic Municipal Employees Plan and Trust Agreement, ("Plan"), and hereby adopts and approves this Amendment No. 1 to the Plan and authorizes the Mayor or his designee to execute it below.

1.2 **Effective date of Amendment**. This Amendment is effective as indicated below for the respective provisions; provided, however, that an effective date shall not be earlier than the effective date of the Plan.

1.3 **Superseding of inconsistent provisions**. This Amendment supersedes the provisions of the Plan to the extent those provisions are inconsistent with the provisions of this Amendment.

1.4 **Construction.** Provisions of this Amendment that are applicable to a defined benefit plan are included to the extent the Plan provides a minimum defined benefit. Except as otherwise provided in this Amendment, any reference to "Article" or "Section" in this Amendment refers only to articles or sections within this Amendment, and is not a reference to the Plan.

1.5 **Effect of restatement of Plan.** If the City of Grand Island restates the Plan, then this Amendment shall remain in effect after such restatement unless the provisions in this Amendment are restated or otherwise become obsolete (e.g., if the Plan is restated into a plan document which incorporates Pension Protection Act of 2006 ("PPA"), and other provisions herein for subsequent legislation and guidance).

ARTICLE II
CITY ELECTIONS

2.1 **Applicable Provisions**. Unless the City otherwise specifies in this Amendment, the following will apply:

a. The applicable mortality table described in Amendment Section 3.3.3(c) is effective for years beginning after December 31, 2008.

b. Nonspousal beneficiary rollovers shall be permitted effective for distributions made on or after January 1, 2008.

c. In-Service distributions prior to Normal Retirement Age are not permitted.

d. Once Code Section 436 benefit restrictions no longer apply, the Amendment provides for the (1) automatic restoration of benefit accruals, and (2) no "annuity starting date"; provided, however, Code Section 436 benefit restriction provisions do not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d) and

exempt from the requirements of Code Sections 401(a)(29) and 436 by reason of being excluded from the funding requirements of Code Section 412.

e. Continued benefit accruals pursuant to the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) are not provided. Distributions upon deemed severance of employment under the HEART Act are not permitted.

f. The applicable interest rate shall be based on the first month (lookback month) prior to the Plan Year (stability period) during which a distribution is made.

2.2 **Effective date of applicable mortality table set forth in Amendment Section 3.3.3(c).** The applicable mortality table described in Amendment Section 3.3.3(c) is effective for years beginning after December 31, 2008.

2.3 **Non-spousal rollovers** (Article IV). Nonspousal beneficiary rollovers shall be permitted effective for distributions made on or after January 1, 2008.

2.4 **In-service distributions** (Article VIII). In-Service Distributions prior to Normal Retirement Age are not permitted.

2.5 **Code Section 436 Benefit Restrictions (Article XII)**

Treatment of Plan as of Close of Prohibited or Cessation Period (Section XII(h)). Unless otherwise elected below, accruals that had been limited under Code Section 436(e) will be automatically restored as of the "Section 436 measurement date" that the limitation ceases to apply; and

Accelerated Benefit Distributions (Section XII(h)). Unless otherwise elected below, (1) there is no new "annuity starting date" with respect to payments made as a result of the benefit limitations no longer being applicable, and (2) there are no optional forms of benefit that are only available for the period of the benefit restrictions;

Provided, however, the Code Section 436 benefit restriction provisions do not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d) and exempt from the requirements of Code Sections 401(a)(29) and 436 by reason of being excluded from the funding requirements of Code Section 412.

2.6 **Continued benefit accruals and distributions upon deemed severance (Article XIII).** Continued benefit accruals for the Heart Act (Amendment Section 13.2) will not apply. Further, distributions upon deemed severance of employment under the HEART Act (Amendment Section 13.4) will not be permitted.

2.7 **Applicable interest rate.** For purposes of Amendment Section 14.2, unless otherwise elected below, the stability period is the Plan Year during which a distribution is made and the lookback month is the first calendar month preceding the first day of the stability period.

ARTICLE III
PENSION FUNDING EQUITY ACT OF 2004 AS MODIFIED BY SUBSEQUENT LEGISLATION

3.1 **General Rule.** This Article applies to the determination of Code Section 415 limits.

3.1.1 **Effective date.** The City adopts this Article III to reflect certain provisions of the Pension Funding Equity Act of 2004 (PFEA), as modified by the Pension Protection Act of 2006 and the

Worker, Retiree and Employer Recovery Act of 2008. Except as otherwise provided herein, effective for distributions in Plan Years beginning after December 31, 2003, the required determination of actuarial equivalence of forms of benefit other than a straight life annuity shall be made in accordance with this Amendment. However, this Amendment does not supersede any prior election to apply the transition rule of section 101(d)(3) of PFEA as described in Notice 2004-78.

3.1.2 **Definition of "Applicable Mortality Table."** The "applicable mortality table" means the applicable mortality table within the meaning of Code Section 417(e)(3)(B) (as described in Article XIV), subject to any special effective dates specified in this Article III.

3.2 **Benefit Forms Not Subject to the Present Value Rules of Code Section 417(e)(3)**

3.2.1 **Form of benefit.** The straight life annuity that is actuarially equivalent to the Participant's form of benefit shall be determined under this Section 3.2 if the form of the Participant's benefit is either:

(a) A nondecreasing annuity (other than a straight life annuity) payable for a period of not less than the life of the Participant (or, in the case of a qualified pre-retirement survivor annuity, the life of the surviving spouse), or

(b) An annuity that decreases during the life of the Participant merely because of:

(1) The death of the survivor annuitant (but only if the reduction is not below 50% of the benefit payable before the death of the survivor annuitant), or

(2) The cessation or reduction of Social Security supplements or qualified disability payments (as defined in Code Section 401(a)(11)).

3.2.2 **Limitation Years beginning before July 1, 2007** – For Limitation Years beginning before July 1, 2007, the actuarially equivalent straight life annuity is equal to the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit computed using whichever of the following produces the greater annual amount:

(a) the interest rate and mortality table (or other tabular factor specified in the Plan for adjusting benefits in the same form; and

(b) a 5 percent interest rate assumption and the "applicable mortality table" defined in the Plan for that annuity starting date.

3.2.3 **Limitation Years beginning on or after July 1, 2007.** For Limitation Years beginning on or after July 1, 2007, the actuarially equivalent straight life annuity is equal to the greater of:

(a) The annual amount of the straight life annuity (if any) payable to the Participant under the Plan commencing at the same annuity starting date as the Participant's form of benefit; and

(b) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using a 5 percent interest rate assumption and the applicable mortality table defined in the Plan for that annuity starting date.

3.3 **Benefit Forms Subject to the Present Value Rules of Code Section 417(e)(3).**

3.3.1 **Form of benefit.** The straight life annuity that is actuarially equivalent to the Participant's form of benefit shall be determined as indicated under this Section 3.3 if the form of the Participant's benefit is other than a benefit form described in Section 3.2.1 above.

3.3.2 **Annuity Starting Date in small plans for Plan Years Beginning in 2009 and later.** Notwithstanding anything in this Amendment to the contrary, if the annuity starting date of the Participant's form of benefit is in a Plan Year beginning in or after 2009, and if the Plan is maintained by an eligible employer as defined in Code Section 408(p)(2)(C)(i), the actuarially equivalent straight life annuity is equal to the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using whichever of the following produces the greater annual amount:

(a) The interest rate and the mortality table (or other tabular factor) specified in the Plan for adjusting benefits in the same form; and

(b) A 5.5 percent interest rate assumption and the applicable mortality table described in Article XIV.

3.3.3 **Annuity Starting Date in Plan Years Beginning After 2005.** Except as provided in Section 3.3.2, if the annuity starting date of the Participant's form of benefit is in a Plan Year beginning after December 31, 2005, the actuarially equivalent straight life annuity is equal to the greatest of:

(a) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using the interest rate and the mortality table (or other tabular factor) specified in the Plan for adjusting benefits in the same form;

(b) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using a 5.5 percent interest rate assumption and the applicable mortality table for the distribution under Treasury Regulations Section 1.417(e)-1(d)(2) (determined in accordance with Article XIV for Plan Years after the effective date specified below); and

(c) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the Participant's form of benefit, computed using the applicable interest rate for the distribution under Treasury Regulations Section 1.417(e)-1(d)(3) (determined in accordance with Article XIV for Plan Years after the effective date of that Article) and the applicable mortality table for the distribution under Treasury Regulations Section 1.417(e)-1(d)(2) (determined in accordance with Article XIV for Plan Years after the effective date specified below), divided by 1.05.

The effective date of the applicable mortality table above is for years beginning after December 31, 2008.

3.3.4 **Annuity Starting Date in Plan Years Beginning in 2004 or 2005** – If the annuity starting date of the Participant's form of benefit is in a Plan Year beginning in 2004 or 2005, the actuarially equivalent straight life annuity is equal to the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as

the participant's form of benefit, computed using whichever of the following produces the greater annual amount:

(a) The interest rate and the mortality table (or other tabular factor) specified in the Plan for adjusting benefits in the same form; and

(b) A 5.5 percent interest rate assumption and the applicable mortality table for the distribution under Regulations Section 1.417(e)-1(d)(2).

However, this Section does not supersede any prior election to apply the transition rule of section 101(d)(3) of PFEA as described in Notice 2004-78.

ARTICLE IV
DIRECT ROLLOVER OF NON-SPOUSAL DISTRIBUTION

4.1 **Non-spouse beneficiary rollover right (for distributions on or after January 1, 2008).** A non-spouse beneficiary who is a "designated beneficiary" under Code Section 401(a)(9)(E) and the Regulations thereunder, by a direct trustee-to-trustee transfer ("direct rollover"), may roll over all or any portion of his or her distribution to an Individual Retirement Account (IRA) the beneficiary establishes for purposes of receiving the distribution. In order to be able to roll over the distribution, the distribution otherwise must satisfy the definition of an "eligible rollover distribution" under Code Section 401(a)(31).

4.2 **Applicability of certain requirements.** For Plan Years beginning on or after January 1, 2010, any direct rollover of a distribution by a nonspouse beneficiary shall be subject to the direct rollover requirements of Code Section 401(a)(31) (including Code Section 401(a)(31)(B)), the notice requirements of Code Section 402(f) and the mandatory withholding requirements of Code Section 3405(c). Before that date, any such distribution shall not be subject to said requirements. Any distribution from the Plan to a non-spouse beneficiary shall not be eligible for a 60-day (non-direct) rollover.

4.3 **Trust beneficiary.** Subject to Section 4.1, if the Participant's named beneficiary is a trust, the Plan may make a direct rollover to an IRA on behalf of the trust, provided the trust satisfies the requirements to be a designated beneficiary within the meaning of Code Section 401(a)(9)(E).

4.4 **Required minimum distributions not eligible for rollover.** A non-spouse beneficiary is not permitted to roll over an amount that is a required minimum distribution, as determined under applicable Treasury Regulations and other Internal Revenue Service guidance. If the Participant dies before his or her required beginning date and the non-spouse beneficiary rolls over to an IRA the maximum amount eligible for rollover, the beneficiary may elect to use either the 5-year rule or the life expectancy rule, pursuant to Treasury Regulations Section 1.401(a)(9)-3, A-4(c), in determining the required minimum distributions from the IRA that receives the non-spouse beneficiary's distribution.

ARTICLE V
ROLLOVER OF AFTER-TAX AMOUNTS

5.1 **Direct rollover to qualified plan/403(b) plan (for taxable years beginning after December 31, 2006).** A Participant may elect to transfer employee after-tax contributions, if any, by means of a direct rollover to a qualified plan or to a 403(b) plan that agrees to account separately for amounts so transferred (including interest thereon), including accounting separately for the portion of such distribution which is includible in gross income and the portion of such distribution which is not includible in gross income.

ARTICLE VI
PARTICIPANT DISTRIBUTION NOTIFICATION

6.1 **180-day notification period (effective for distribution notices in Plan Years beginning after December 31, 2006).** Reference to the 90-day maximum notice period requirements of Code Sections 402(f) (the rollover notice), 411(a)(11) (Participant's consent to distribution), and 417 (notice regarding the joint and survivor annuity rules), if any, is changed to 180 days.

6.2 **Effect of delay of distribution.** Notices given to Participants pursuant to Code Section 411(a)(11) in Plan Years beginning after December 31, 2006, if any, shall include a description of the consequences of failing to defer a distribution, including (i) for any individual account balance, a description of investment options available under the Plan (including fees) that will be available if the Participant defers distribution, (ii) for any defined benefit, how much larger benefits will be if the commencement of distributions is deferred, and (iii) the portion of the summary plan description that contains any special rules that might affect materially a Participant's decision to defer.

6.3 **Explanation of relative value.** Notices to Participants shall include the relative values of the various optional forms of benefit under the Plan as provided in Treasury Regulations Section 1.417(a)-3, to the extent said Regulations are applicable to the Plan. This provision is effective as of the applicable effective date set forth in Treasury Regulations (i.e., to qualified pre-retirement survivor annuity explanations provided on or after July 1, 2004; to qualified joint and survivor annuity explanations with respect to any distribution with an annuity starting date that is on or after February 1, 2006, or on or after October 1, 2004 with respect to any optional form of benefit that is subject to the requirements of Code Section 417(e)(3) if the actuarial present value of that optional form is less than the actuarial present value as determined under Code Section 417(e)(3)). Provided, however, pursuant to the flush language of Code Section 401(a) and Code Section 411(e)(1)(B), the provisions of Code Sections 401(a)(11) and 417, and consequently this Article VI, shall not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d).

ARTICLE VII
QUALIFIED DOMESTIC RELATIONS ORDERS

7.1 **Permissible QDROs (effective on and after April 6, 2007).** For purposes of provisions of the Plan regarding domestic relations orders, if any, a domestic relations order that otherwise satisfies the requirements for a qualified domestic relations order (QDRO) will not fail to be a QDRO: (i) solely because the order is issued after, or revises, another domestic relations order or QDRO; or (ii) solely because of the time at which the order is issued, including issuance after the annuity starting date or after the Participant's death.

7.2 **Other QDRO requirements apply.** A domestic relations order described in Section 7.1 is subject to the same requirements and protections that apply to any other QDRO.

ARTICLE VIII
PRE-RETIREMENT PENSION IN-SERVICE DISTRIBUTIONS

8.1 **No age 62 in-service distributions.** As specified in Amendment Section 2.4, a Participant who has attained the specified age and who is not separated from employment may not elect to receive a distribution of his or her vested Accrued Benefit.

ARTICLE IX
QUALIFIED OPTIONAL SURVIVOR ANNUITY

9.1 **Right to Elect Qualified Optional Survivor Annuity (effective for distributions with annuity starting dates in Plan Years beginning after December 31, 2007).** A Participant who elects to waive the qualified joint and survivor annuity form of benefit under the Plan, if provided for under the Plan, shall be entitled to elect the "qualified optional survivor annuity" at any time during the applicable election period. Furthermore, the written explanation of the joint and survivor annuity, if required, shall explain the terms and conditions of the "qualified optional survivor annuity." Provided, however, the following rules apply in the specified circumstances:

(a) **Special Effective Date Rules.**

1. If the Plan permits retroactive annuity starting dates and a Participant elects a distribution with a retroactive annuity starting date (pursuant to Treasury Regulations Section 1.417(e)-1(b)(3)(iv)) that is before the aforementioned effective date, the date of the first actual payment of benefits based on the retroactive annuity starting date is substituted for the annuity starting date for purposes of applying the rules of this paragraph.

2. In the case of a plan that is subject to Code Section 401(a)(11) and that is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified on or before August 17, 2006 (the date of enactment of PPA '06), the changes to Code Section 417 made by Section 1004 of PPA '06 apply to distributions with annuity starting dates during plan years beginning on or after the earlier of (i) January 1, 2008 or, if later, the date on which the last collective bargaining agreement related to the plan terminates (determined without regard to any extensions to a collective bargaining agreement made after August 17, 2006), or (ii) January 1, 2009.

(b) **Inapplicability to Governmental Plans.** Pursuant to the flush language of Code Section 401(a) and the provisions of Code Section 411(e)(1)(A), the provisions of Code Sections 401(a)(11) and 417, and consequently this Article IX, shall not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d).

9.2 **Definition of Qualified Optional Survivor Annuity.**

(a) For purposes of this Article, the term "qualified optional survivor annuity" means an annuity:

(1) For the life of the Participant with a survivor annuity for the life of the Participant's spouse which is equal to the "applicable percentage" of the amount of the annuity which is payable during the joint lives of the Participant and the Participant's spouse, and

(2) Which is the actuarial equivalent of a single annuity for the life of the Participant.

Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

(b) For purposes of this Section, the "applicable percentage" is based on the survivor annuity percentage (i.e., the percentage which the survivor annuity under the Plan's qualified joint and survivor annuity bears to the annuity payable during the joint lives of the Participant and the spouse). If the survivor annuity percentage is less than seventy-five percent (75%), then the "applicable percentage" is seventy-five percent (75%). If the

survivor annuity percentage is equal to or greater than seventy-five percent (75%), the "applicable percentage" is fifty percent (50%).

ARTICLE X
DIRECT ROLLOVER TO ROTH IRA

10.1 **Roth IRA rollover.** For distributions made after December 31, 2007, a Participant or beneficiary may elect to roll over directly an "eligible rollover distribution" to a Roth IRA described in Code Section 408A(b); provided, however, for taxable years beginning before January 1, 2010, an individual cannot make a qualified rollover contribution from an eligible retirement plan other than a Roth IRA if, for the year the eligible rollover distribution is made, he or she has modified adjusted gross income exceeding $100,000 or is married and files a separate return. For this purpose, the term "eligible rollover distribution" includes a rollover distribution described in Article V, if applicable.

ARTICLE XI
TOP-HEAVY PROVISIONS

11.1 **Severance from employment.** Effective for any Plan Year beginning after December 31, 2001, any provisions of the Plan setting forth the top-heavy provisions of Code Section 416 are modified by substituting the term "separation from service" with "severance from employment."

ARTICLE XII
BENEFIT RESTRICTIONS

(a) **Effective Date and Application of Article.**

(1) Effective Date. The provisions of this Article apply to Plan Years beginning after December 31, 2007.

(2) This Article only applies to single employer plans (a plan that is not a multiemployer plan within the meaning of Code Section 414(f)) and does not apply to a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers.

(A) Multiple Employer Plans. In the case of a multiple employer plan to which Code Section 413(c)(4)(A) applies, Code Section 436 applies separately with respect to each employer under the plan, as if each employer maintained a separate plan. Thus, the benefit limitations under Code Section 436 could apply differently to participants who are employees of different employers under such a multiple employer plan. In the case of a multiple employer plan to which Code Section 413(c)(4)(A) does not apply (that is, a plan described in Code Section 413(c)(4)(B) that has not made the election for Code Section 413(c)(4)(A) to apply), Code Section 436 applies as if all participants in the plan were employed by a single employer.

(B) Governmental Plans. Code Section 436 benefit restrictions and other provisions described in this Article do not apply to this Plan because it is a governmental plan within the meaning of Code Section 414(d) and exempt from the requirements of Code Sections 401(a)(29) and 436 by reason of being exempt from the funding requirements of Code Section 412.

(3) The limitations described in Subsections (b), (c) and (e) do not apply to the Plan for the first five (5) Plan Years of the Plan. Except as otherwise provided by the Commissioner in guidance of general applicability, the Plan Years taken into account for this purpose include the following (in addition to Plan Years during which the Plan was maintained by the Employer):

(A) Plan Years when the Plan was maintained by a predecessor employer within the meaning of Regulations Section 1.415(f)-1(c)(1);

(B) Plan years of another defined benefit plan maintained by a predecessor employer within the meaning of Regulations Section 1.415(f)-1(c)(2) within the preceding five years if any Participants in the Plan participated in that other defined benefit plan (even if the Plan maintained by the Employer is not the plan that was maintained by the predecessor employer); and

(C) Plan years of another defined benefit plan maintained by the Employer within the preceding five years if any Participants in the Plan participated in that other defined benefit plan.

(4) Notwithstanding anything in this Article to the contrary, the provision of Code Section 436 and the Regulations thereunder are incorporated herein by reference.

(5) For Plans that have a valuation date other than the first day of the Plan Year, the provisions of Code Section 436 and this Article will be applied in accordance with Regulations.

(b) **Funding-Based Limitation on Shutdown Benefits and Other Unpredictable Contingent Event Benefits**

(1) In general. If a Participant is entitled to an "unpredictable contingent event benefit" payable with respect to any event occurring during any Plan Year, then such benefit may not be provided if the "adjusted funding target attainment percentage" for such Plan Year (A) is less than sixty percent (60%) or, (B) sixty percent (60%) or more, but would be less than sixty percent (60%) percent if the "adjusted funding target attainment percentage" were redetermined applying an actuarial assumption that the likelihood of occurrence of the "unpredictable contingent event" during the Plan Year is one hundred percent (100%).

(2) Exemption. Paragraph (1) shall cease to apply with respect to any Plan Year, effective as of the first day of the Plan Year, upon payment by the Employer of the contribution described in Regulations Section 1.436-1(f)(2)(iii).

(c) **Limitations on Plan Amendments Increasing Liability for Benefits**

(1) In general. No amendment which has the effect of increasing liabilities of the Plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable may take effect during any Plan Year if the "adjusted funding target attainment percentage" for such Plan Year is:

(A) less than eighty percent (80%), or

(B) eighty percent (80%) or more, but would be less than eighty percent (80%) if the benefits attributable to the amendment were taken into account in determining the "adjusted funding target attainment percentage."

(2) Exemption. Paragraph (c)(1) above shall cease to apply with respect to a Plan amendment upon payment by the Employer of the contribution described in Regulations Section 1.436-1(f)(2)(iv).

(3) Exception for certain benefit increases. Paragraph (1) shall not apply to any amendment as otherwise provided in Regulations Section 1.436-1(c).

(d) **Limitations on Prohibited Payments**

(1) Funding percentage less than sixty percent (60%). If the Plan's "adjusted funding target attainment percentage" for a Plan Year is less than sixty percent (60%), then a Participant or Beneficiary shall not be permitted to elect, and the Plan may not pay, any "prohibited payment" with an "annuity starting date" on or after the applicable "Section 436 measurement date."

(2) Bankruptcy. A Participant or Beneficiary shall not be permitted to elect, and the Plan may not pay, any "prohibited payment" with an "annuity starting date" that occurs during any period in which the Employer is a debtor in a case under Title 11, United States Code, or similar Federal or State law. The preceding sentence shall not apply to payments made within a Plan Year with an "annuity starting date" that occurs on or after the date on which the enrolled actuary of the Plan certifies that the "adjusted funding target attainment percentage" of the Plan is not less than one hundred percent (100%).

(3) Limited payment if percentage at least sixty percent (60%) but less than eighty percent (80%) percent.

(A) In general. If the Plan's "adjusted funding target attainment percentage" for a Plan Year is sixty percent (60%) or greater but less than eighty percent (80%), then a Participant or Beneficiary shall not be permitted to elect, and the Plan may not pay, any "prohibited payment" with an "annuity starting date" on or after the applicable "Section 436 measurement date," unless the present value (determined in accordance with Code Section 417(e)(3)) of the portion of the benefit that is being paid in a "prohibited payment" (which portion is determined under paragraph (C)(i) below) does not exceed the lesser of:

(i) fifty (50) percent of the amount of the present value (determined in accordance with Code Section 417(e)(3)) of the benefit payable in the optional form of benefit that includes the prohibited payment; or

(ii) 100% of the "PBGC maximum benefit guarantee amount."

(B) Bifurcation if optional form unavailable.

(i) Requirement to offer bifurcation. If an optional form of benefit that is otherwise available under the terms of the plan is not available as of the "annuity starting date" because of the application of Regulations Section 1.436-1(d)(3)(i), then the Participant or Beneficiary may elect to:

(1) Receive the unrestricted portion of that optional form of benefit (determined under the rules of Regulations Section 1.436-1(d)(3)(iii)(D)) at that "annuity starting date," determined by treating the unrestricted portion of the benefit as if it were the Participant's or Beneficiary's entire benefit under the plan;

(2) Commence benefits with respect to the Participant's or Beneficiary's entire benefit under the Plan in any other optional form of benefit available under the Plan at the same "annuity starting date" that satisfies Regulations Section 1.436-1(d)(3)(i); or

(3) Defer commencement of the payments to the extent described in Regulations Section 1.436-1(d)(5).

(ii) Rules relating to bifurcation. If the Participant or Beneficiary elects payment of the unrestricted portion of the benefit as described in Regulations Section 1.436-1(d)(3)(ii)(A)(1), then the Participant or Beneficiary may elect payment of the remainder of the Participant's or Beneficiary's benefits under the Plan in any optional form of benefit at that "annuity starting date" otherwise available under the Plan that would not have included a "prohibited payment" if that optional form applied to the entire benefit of the Participant or Beneficiary. The rules of Regulations Section 1.417(e)-1 are applied separately to the separate optional forms for the "unrestricted portion of the benefit" and the remainder of the benefit (the restricted portion).

(iii) Plan alternative that anticipates election of payment that includes a "prohibited payment." With respect to every optional form of benefit that includes a "prohibited payment" and that is not permitted to be paid under Regulations Section 1.436-1 (d)(3)(i), for which no additional information from the Participant or Beneficiary (such as information regarding a Social Security leveling optional form of benefit) is needed to make that determination, rather than wait for the Participant or Beneficiary to elect such optional form of benefit, the Plan will provide for separate elections with respect to the restricted and unrestricted portions of that optional form of benefit.

(C) Definitions applicable to limited payment option. The following definitions apply for purposes of this subsection (d)(3).

(i) Portion of benefit being paid in a prohibited payment. If a benefit is being paid in an optional form for which any of the payments is greater than the amount payable under a straight life annuity to the Participant or Beneficiary (plus any Social Security supplements described in the last sentence of Code Section 411(a)(9) payable to the Participant or Beneficiary) with the same "annuity starting date," then the portion of the benefit that is being paid in a "prohibited payment" is the excess of each payment over the smallest payment during the Participant's lifetime under the optional form of benefit (treating a period after the "annuity starting date" and during the Participant's lifetime in which no payments are made as a payment of zero).

(ii) PBGC maximum benefit guarantee amount. The "PBGC maximum benefit guarantee amount" is the present value (determined under guidance prescribed by the Pension Benefit Guaranty Corporation, using the interest and mortality assumptions under Code Section 417(e)) of the maximum benefit guarantee with respect to a Participant (based on the Participant's age or the Beneficiary's age at the "annuity starting date") under ERISA Section 4022 for the year in which the "annuity starting date" occurs.

(iii) Unrestricted portion of the benefit:

(1) General rule. Except as otherwise provided in this paragraph (iii), the unrestricted portion of the benefit with respect to any optional form of benefit is fifty percent (50%) of the amount payable under the optional form of benefit.

(2) Special rule for forms which include Social Security leveling or a refund of employee contributions. For an optional form of benefit that is a prohibited payment on account of a Social Security leveling feature (as defined in Regulations Section 1.411(d)-3(g)(16)) or a refund of

employee contributions feature (as defined in Regulations Section 1.411(d)-3(g)(11)), the unrestricted portion of the benefit is the optional form of benefit that would apply if the Participant's or Beneficiary's Accrued Benefit were fifty percent (50%) smaller.

(3) Limited to PBGC maximum benefit guarantee amount. After the application of the preceding rules of this paragraph (iii), the unrestricted portion of the benefit with respect to the optional form of benefit is reduced, to the extent necessary, so that the present value (determined in accordance with Code Section 417(e)) of the unrestricted portion of that optional form of benefit does not exceed the "PBGC maximum benefit guarantee amount."

(D) Other Rules.

(i) One time application. If a Participant with respect to whom a prohibited payment (or a series of prohibited payments under a single optional form of benefit) is made pursuant to paragraph (d)(3)(A) or (B) above, no additional prohibited payment may be made with respect to that Participant during any consecutive Plan Years for which prohibited payments are limited under this subsection (d).

(ii) Treatment of beneficiaries. For purposes of this subparagraph (d)(3), benefits provided with respect to a Participant and any Beneficiary of the Participant (including an alternate payee, as defined in Code Section 414(p)(8)) are aggregated. If the only benefits paid under the plan with respect to the Participant are death benefits payable to the Beneficiary, then paragraph (d)(3)(C)(i) of this section is applied by substituting the lifetime of the Beneficiary for the lifetime of the Participant. If the Accrued Benefit of a Participant is allocated to such an alternate payee and one or more other persons, then the "unrestricted amount" of (d)(3)(C)(iii) is allocated among such persons in the same manner as the accrued benefit is allocated, unless a qualified domestic relations order (as defined in Code Section 414(p)(1)(A)) with respect to the Participant or the alternate payee provides otherwise.

(iii) Treatment of annuity purchases and plan transfers. This paragraph (d)(3)(D)(iii) applies for purposes of applying subsections (d)(3)(A) and (d)(3)(C)(iii). In the case of a prohibited payment described in Regulations Section 1.436-1(j)(6)(i)(B) (relating to purchase from an insurer), the present value of the portion of the benefit that is being paid in a prohibited payment is the cost to the plan of the irrevocable commitment and, in the case of a prohibited payment described in Regulations Section 1.436-1(j)(6)(i)(C) (relating to certain plan transfers), the present value of the portion of the benefit that is being paid in a prohibited payment is the present value of the liabilities transferred (determined in accordance with Code Section 414(l)). In addition, the present value of the accrued benefit is substituted for the present value of the benefit payable in the optional form of benefit that includes the prohibited payment in Regulations Section 1.436-1(d)(3)(i)(A).

(4) Exception. This subsection (d) shall not apply for any Plan Year if the terms of the Plan (as in effect for the period beginning on September 1, 2005, and ending with such Plan Year) provide for no benefit accruals with respect to any Participant during such period.

(5) Right to delay commencement. If a Participant or Beneficiary requests a distribution in an optional form of benefit that includes a "prohibited payment" that is not permitted to be paid under paragraph (d)(1), (d)(2), or (d)(3) of this Article, then the Participant retains the right to delay commencement of benefits in accordance with the terms of the plan and applicable qualification requirements (such as Code Sections 411(a)(11) and 401(a)(9)).

(6) "Prohibited payment." For purposes of this subsection (d), the term "prohibited payment" means:

(A) Any payment for a month that is in excess of the monthly amount paid under a single life annuity (plus any Social Security supplements described in the last sentence of Code Section 411(a)(9)), to a Participant or Beneficiary whose "annuity starting date" occurs during any period a limitation under paragraph (d) is in effect;

(B) Any payment for the purchase of an irrevocable commitment from an insurer to pay benefits; and

(C) Any transfer of assets and liabilities to another plan maintained by the same Employer (or by any member of the Employer's controlled group) that is made in order to avoid or terminate the application of Code Section 436 benefit limitations; and

(D) Any other amount that is identified as a prohibited payment by the Commissioner in revenue rulings and procedures, notices, and other guidance published in the Internal Revenue Bulletin.

Such term shall not include the payment of a benefit which under Code Section 411(a)(11) may be immediately distributed without the consent of the Participant. Furthermore, in the case of a Beneficiary that is not an individual, the amount that is a prohibited payment is determined by substituting the monthly amount payable in installments over 240 months that is actuarially equivalent to the benefit payable to the Beneficiary, as provided in Regulations Section 1.436-1(j)(6)(ii).

(e) **Limitation on Benefit Accruals for Plans with Severe Funding Shortfalls**

(1) In general. If the Plan's "adjusted funding target attainment percentage" for a Plan Year is less than sixty percent (60%), benefit accruals under the Plan shall cease as of the "section 436 measurement date." If the Plan is required to cease benefit accruals under this subsection (e), then the Plan is not permitted to be amended in a manner that would increase the liabilities of the Plan by reason of an increase in benefits or establishment of new benefits. The preceding sentence applies regardless of whether an amendment would otherwise be permissible under subsections (c)(2) or (c)(3) of this Article.

(2) Exemption. Paragraph (1) shall cease to apply with respect to any Plan Year, effective as of the first day of the Plan Year, upon payment by the Employer of the contribution described in Regulations Section 1.436-1(f)(2)(v).

(3) Temporary modification of limitation. In the case of the first Plan Year beginning during the period beginning on October 1, 2008, and ending on September 30, 2009, the provisions of (e)(1) above shall be applied by substituting the Plan's "adjusted funding target attainment percentage" for the preceding Plan Year for such percentage for such Plan Year, but only if the "adjusted funding target attainment percentage" for the preceding year is greater.

(f) **Rules Relating to Contributions Required to Avoid or Terminate Benefit Limitations**

The application of the Code Section 436 benefit limitations may be avoided or terminated in accordance with any of the rules set forth in Code Section 436 and Regulations Section 1.436-1(f).

(g) **Presumed Underfunding for Purposes of Benefit Limitations**

(1) Presumption of continued underfunding.

(A) In general. This paragraph (g)(1) applies to a Plan for a Plan Year if a limitation under subsection (b), (c), (d), or (e) applied to the Plan on the last day of the preceding Plan Year. If this paragraph (g)(1) applies to a Plan, then the first day of the Plan Year is a "Section 436 measurement date" and the presumed "adjusted funding target attainment percentage" for the Plan is the percentage under paragraph (g)(1)(B) or (C) of this subsection, whichever applies to the Plan, beginning on that first day of the Plan Year and ending on the date specified in subparagraph (g)(1)(D) of this section.

(B) Rule where preceding year certification issued during preceding year.

(i) General rule. In any case in which the Plan's enrolled actuary has issued a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" for the Plan Year preceding the current Plan Year before the first day of the current Plan Year, the presumed "adjusted funding target attainment percentage" of the Plan for the current Plan Year is equal to the prior Plan Year "adjusted funding target attainment percentage" until it is changed under Regulations Section 1.436-1(h)(1)(iv).

(ii) Special rule for late certifications. If the certification of the adjusted funding target attainment percentage for the prior Plan Year occurred after the first day of the 10th month of that prior Plan Year, the Plan is treated as if no such certification was made, unless the certification took into account the effect of any unpredictable contingent event benefits that are permitted to be paid based on unpredictable contingent events that occurred, and any Plan amendments that became effective, during the prior Plan Year but before the certification (and any associated Code Section 436 contributions).

(C) No certification for preceding year issued during preceding year.

(i) Deemed percentage continues. In any case in which the Plan's enrolled actuary has not issued a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" of the Plan for the Plan Year preceding the current Plan Year during that prior Plan Year, the presumed "adjusted funding target attainment percentage" of the Plan for the current Plan Year is equal to the presumed "adjusted funding target attainment percentage" that applied on the last day of the preceding Plan Year until the presumed "adjusted funding target attainment percentage" is changed under Regulations Section 1.436-1(h)(1)(iii)(B) or (h)(1)(iv).

(ii) Enrolled actuary's certification in following year. In any case in which the Plan's enrolled actuary has issued the certification under Regulations Section 1.436-1(h)(4) of the adjusted funding target attainment percentage of the Plan for the Plan Year preceding the current Plan Year on or after the first day of the current Plan Year, the date of that prior Plan Year certification is a new "Section 436 measurement date" for the current Plan Year. In such a case, the presumed

adjusted funding target attainment percentage for the current Plan Year is equal to the prior Plan Year adjusted funding target attainment percentage (reduced by 10 percentage points if Regulations Section 1.436-1(h)(2)(iv) applies to the Plan) until it is changed under Regulations Section 1.436-1(h)(1)(iv). The rules of Regulations Section 1.436-1(h)(1)(ii)(B) apply for purposes of determining whether the enrolled actuary has issued a certification of the adjusted funding target attainment percentage for the prior Plan Year during the current Plan Year.

(D) Duration of use of presumed "adjusted funding target attainment percentage." If this paragraph (g)(1) applies to a Plan for a Plan Year, then the presumed "adjusted funding target attainment percentage" determined under this paragraph (g)(1) applies until the earliest of:

(i) The first day of the 4th month of the Plan Year if paragraph (g)(2) of this section applies;

(ii) The first day of the 10th month of the Plan Year if paragraph (g)(3) of this section applies;

(iii) The date of a change in the presumed adjusted funding target attainment percentage under Regulations Section 1.436-1(g)(4); or

(iv) The date the enrolled actuary issues a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" for the Plan Year.

(2) Presumption of underfunding beginning on first day of 4th month for certain underfunded plans. This paragraph (2) applies to a Plan for a Plan Year if the enrolled actuary for the Plan has not issued a certification of the "adjusted funding target attainment percentage" for the Plan Year before the first day of the 4th month of the Plan Year, and the Plan's "adjusted funding target attainment percentage" for the preceding Plan Year was either (1) at least sixty percent (60%) but less than seventy percent (70%); or (2) at least eighty percent (80%) but less than ninety percent (90%). This paragraph (2) also applies to a Plan for the first effective Plan Year if the enrolled actuary for the Plan has not issued a certification of the "adjusted funding target attainment percentage" for the Plan Year before the first day of the 4th month of the Plan Year, and the prior Plan Year "adjusted funding target attainment percentage" is at least seventy percent (70%) but less than eighty percent (80%).

(A) Presumed adjusted funding target attainment percentage. Application of this paragraph. If this paragraph (2) applies to a Plan for a Plan Year and the date of the enrolled actuary's certification of the "adjusted funding target attainment percentage" under Regulations Section 1.436-1(h)(4) for the prior Plan Year (taking into account the special rules for late certifications under Regulations Section 1.436-1(h)(1)(ii)(B)) occurred before the first day of the 4th month of the current Plan Year, then, commencing on the first day of the 4th month of the current Plan Year:

(i) The presumed "adjusted funding target attainment percentage" of the Plan for the Plan Year is reduced by 10 percentage points; and

(ii) The first day of the 4th month of the Plan Year is a "Section 436 measurement date."

(B) Certification for prior Plan Year. If this paragraph (2) applies to a Plan and the date of the enrolled actuary's certification of the "adjusted funding target attainment

percentage" under Regulations Section 1.436-1(h)(4) for the prior Plan Year (taking into account the rules for late certifications under Regulations Section 1.436-1(h)(1)(ii)(B)) occurs on or after the first day of the 4th month of the current Plan Year, then, commencing on the date of that prior Plan Year certification:

(i) The presumed "adjusted funding target attainment percentage" of the Plan for the current Plan Year is equal to 10 percentage points less than the prior Plan Year "adjusted funding target attainment percentage"; and

(ii) The date of the prior Plan Year certification is a "Section 436 measurement date."

(C) Duration of use of presumed "adjusted funding target attainment percentage." If this paragraph (2) applies to a Plan for a Plan Year, the presumed adjusted funding target attainment percentage determined under this paragraph (2) applies until the earliest of:

(i) The first day of the 10th month of the Plan Year if paragraph (3) of this section applies;

(ii) The date of a change in the presumed "adjusted funding target attainment percentage" under Regulations Section 1.436-1(g)(4); or

(iii) The date the enrolled actuary issues a certification under Regulations Section 1.436-1(h)(4) of the "adjusted funding target attainment percentage" for the Plan Year.

(3) Presumption of underfunding beginning on first day of 10th month. In any case in which no certification of the specific adjusted funding target attainment percentage for the current Plan Year under Regulations Section 1.436-1(h)(4) is made with respect to the Plan before the first day of the 10th month of the Plan Year, then, commencing on the first day of the 10th month of the current Plan Year:

(A) The presumed "adjusted funding target attainment percentage" of the Plan for the Plan Year is presumed to be less than sixty percent (60%); and

(B) The first day of the 10th month of the Plan Year is a "Section 436 measurement date."

(h) **Treatment of Plan as of Close of Prohibited or Cessation Period.**

(1) Application to prohibited payments and accruals.

(A) Resumption of prohibited payments. If a limitation on prohibited payments under Section (d) of this Article applied to a Plan as of a "Section 436 measurement date," but that limit no longer applies to the Plan as of a later "Section 436 measurement date," then the limitation on prohibited payments under the Plan does not apply to benefits with "annuity starting dates" that are on or after that later "Section 436 measurement date." Any amendment to eliminate an optional form of benefit that contains a prohibited payment with respect to an "annuity starting date" during a period in which the limitations of Code Section 436(d) and Regulations Section 1.436-1(d) do not apply to the Plan is subject to the rules of Code Section 411(d)(6).

(B) Resumption of benefit accruals. If a limitation on benefit accruals under Regulations Section 1.436-1(e) applied to a Plan as of a "Section 436 measurement date,"

but that limit no longer applies to the Plan as of a later "Section 436 measurement date," then that limitation does not apply to benefit accruals that are based on service on or after that later "Section 436 measurement date," except to the extent that the Plan provides that benefit accruals will not resume when the limitation ceases to apply. The Plan will comply with the rules relating to partial years of participation and the prohibition on double proration under Department of Labor regulation 29 CFR Section 2530.204-2(c) and (d).

(2) Restoration of options and missed benefit accruals. If elected at Amendment Section 2.5, then Participants who had an "annuity starting date" within a period during which a limitation under Regulations Section 1.436-1(d) applied to the Plan will be provided with the opportunity to have a new "annuity starting date" (which would constitute a new "annuity starting date" under Code Sections 415 and 417) under which the form of benefit previously elected may be modified, subject to applicable qualification requirements, once the limitations of Regulations Section 1.436-1(d) cease to apply. In addition, subject to the rules of Regulations Section 1.436-1(c)(3) and any election made at Amendment Section 2.5, the Plan will automatically restore benefit accruals that had been limited under Code Section 436(e) as of the "Section 436 measurement date" that the limitation ceases to apply.

(3) Shutdown and other unpredictable contingent event benefits. If unpredictable contingent event benefits with respect to an unpredictable contingent event that occurs during the Plan Year are not permitted to be paid after the occurrence of the event because of the limitations of Code Section 436(b) and Regulations Section 1.436-1(b), but are permitted to be paid later in the Plan Year as a result of additional contributions under Regulations Section 1.436-1(f)(2) or pursuant to the enrolled actuary's certification of the "adjusted funding target attainment percentage" for the Plan Year that meets the requirements of Regulations Section 1.436-1(g)(5)(ii)(B), then those unpredictable contingent event benefits must automatically become payable, retroactive to the period those benefits would have been payable under the terms of the Plan (other than Plan terms implementing the requirements of Code Section 436(b)). If the benefits do not become payable during the Plan Year in accordance with the preceding sentence, then the Plan is treated as if it does not provide for those benefits. However, all or any portion of those benefits can be restored pursuant to a Plan amendment that meets the requirements of Code Section 436(c) and Regulations Section 1.436-1(c) and other applicable qualification requirements.

(4) Treatment of Plan amendments that do not take effect. If a Plan amendment does not take effect as of the effective date of the amendment because of the limitations of Code Section 436(c) and Regulations Section 1.436-1, but is permitted to take effect later in the Plan Year as a result of additional contributions under paragraph Regulations Section 1.436-1(f)(2) or pursuant to the enrolled actuary's certification of the "adjusted funding target attainment percentage" for the Plan Year that meets the requirements of paragraph Regulations Section 1.436-1(g)(5)(ii)(C), then the Plan amendment must automatically take effect as of the first day of the Plan Year (or, if later, the original effective date of the amendment). If the Plan amendment cannot take effect during the Plan Year, then it must be treated as if it were never adopted, unless the Plan amendment provides otherwise.

(i) **Definitions.** Defined terms shall have the meaning set forth below and as contained in Regulations Section 1.436-1(j) and shall be interpreted consistent with said Regulations.

(1) The term "adjusted funding target attainment percentage" means the "funding target attainment percentage" per paragraph (A) below, and increasing each of the amounts under subparagraphs (A) and (B) of Code Section 430(d)(2) by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in Code Section 414(q)) which were made by the Plan during the preceding two (2) Plan Years.

(A) The term "funding target attainment percentage" has the same meaning given such term by Code Section 430(d)(2) and the Regulations thereunder, except as otherwise provided herein. However, in the case of Plan Years beginning in 2008, the "funding target attainment percentage" for the preceding Plan Year may be determined using such methods of estimation as the Secretary may provide.

(B) Application to plans which are fully funded without regard to reductions for funding balances.

(1) In general. In the case of a Plan for any Plan Year, if the "funding target attainment percentage" is one hundred percent (100%) or more (determined without regard to the reduction in the value of assets under Code Section 430(f)(4)), the "funding target attainment percentage" for purposes of paragraphs (1) and (1)(A) above shall be determined without regard to such reduction.

(2) Transition rule. Subparagraph (B)(1) shall be applied to Plan Years beginning after 2007 and before 2011 by substituting for "one hundred percent (100%)" the applicable percentage determined in accordance with the following table:

In the case of a Plan Year beginning in calendar year:	The applicable percentage is:
2008	92%
2009	94%
2010	96%

(3) Subparagraph (B)(2) shall not apply with respect to the current Plan Year unless the "funding target attainment percentage" (determined without regard to the reduction in the value of assets under Code Section 430(f)(4)) of the Plan for each preceding Plan Year beginning after 2007 and before the current Plan Year was not less than the applicable percentage with respect to such preceding Plan Year determined under subparagraph (B)(2).

(2) Section 436 measurement date. A "Section 436 measurement date" is the date that is used to determine when the limitations of Code Sections 436(d) and 436(e) apply or cease to apply, and is also used for calculations with respect to applying the limitations of Sections (b) and (c) of this Article.

(3) Annuity starting date. The term "annuity starting date" means the annuity starting date as defined in Regulations Section 1.436-1(j)(2).

(4) Unpredictable contingent event benefit. The term "unpredictable contingent event benefit" means an unpredictable contingent event as defined in Regulations Section 1.436-1(j)(9).

ARTICLE XIII
HEART ACT PROVISIONS

13.1 **Death benefits.** In the case of a death occurring on or after January 1, 2007, if a Participant dies while performing qualified military service (as defined in Code Section 414(u)), the Participant's Beneficiary is entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the Plan as if the Participant had resumed and then terminated employment on account of death. Moreover, the Plan will credit the Participant's

qualified military service as service for vesting purposes, as though the Participant had resumed employment under USERRA immediately prior to the Participant's death.

13.2 **Benefit accrual.** If, pursuant to Amendment Section 2.6, the City elects to apply this Section 13.2, then effective on or after the effective date specified in Section 2.6, for benefit accrual purposes, the Plan treats an individual who dies or becomes disabled (as defined under the terms of the plan) while performing qualified military service with respect to the employer as if the individual had resumed employment in accordance with the individual's reemployment rights under USERRA, on the day preceding death or disability (as the case may be) and terminated said employment on the actual date of death or disability.

(a) **Determination of benefits.** The Plan will determine the amount of employee contributions, if any, of an individual treated as reemployed under this Section 13.2 for purposes of applying Code Section 414(u)(8)(C) on the basis of the individual's average actual employee contributions for the lesser of: (i) the 12-month period of service with the employer immediately prior to qualified military service; or (ii) if service with the employer is less than such 12-month period, the actual length of continuous service with the employer.

13.3 **Differential wage payments.** For years beginning after December 31, 2008:

(i) an individual receiving a differential wage payment, as defined by Code Section 3401(h)(2), shall be treated as an employee of the employer making the payment,

(ii) the differential wage payment shall be treated as compensation for purposes of Code Section 415(c)(3) and Regulations Section 1.415(c)-2 (e.g. for purposes of Code Section 415, top heavy provisions of Code Section 416 and determination of highly compensated employees under Code Section 414(q)), and

(iii) the Plan shall not be treated as failing to meet the requirements of any provision described in Code Section 414(u)(1)(C) (or any corresponding plan provisions, including, but not limited to, Plan provisions related to the average deferral percentage or average contribution percentage, to the extent applicable) by reason of any contribution or benefit which is based on the differential wage payment. Differential wage payments (as described herein) shall constitute compensation for all Plan purposes.

(a) **Nondiscrimination Requirements.** Provided, however, for purposes of subparagraph (iii), all employees of the employer (as determined under Code Section 414(b), (c), (m) and (o)) performing service in the uniformed services described in Code Section 3401(h)(2)(A) shall be entitled to receive differential wage payments on reasonably equivalent terms and, if eligible to participate in a retirement plan maintained by the employer, to make contributions, if contributions are permitted, based on the payments on reasonably equivalent terms (taking into account the provisions of Code Section 410(b)(3), (4) and (5) to the extent applicable).

13.4 **Deemed Severance.** As provided in Section 2.6, the Plan does not permit distribution upon deemed severance of employment.

ARTICLE XIV
CHANGE IN APPLICABLE INTEREST RATE AND APPLICABLE MORTALITY ASSUMPTION

14.1 **Effective date.** Except as provided in regulations or other guidance by the Pension Benefit Guaranty Corporation (PBGC) and IRS, to the extent said regulations or guidance is applicable to this Plan, the limitations of this Article shall first apply in determining the amount payable to a

Participant having an annuity starting date in a Plan Year beginning on or after January 1, 2008.

14.2 **Applicable interest rate.** For purposes of the Plan's provisions relating to the calculation of the present value of a benefit payment that is subject to Code Section 417(e), as well as any other Plan provision referring directly or indirectly to the "applicable interest rate" or "applicable mortality table" used for purposes of Code Section 417(e), any provision prescribing the use of the annual rate of interest on 30-year U.S. Treasury securities shall be implemented by instead using the rate of interest determined by the applicable interest rate described by Code Section 417(e) after its amendment by PPA. Specifically, the applicable interest rate shall be the adjusted first, second, and third segment rates applied under the rules similar to the rules of Code Section 430(h)(2)(C) for the calendar month (lookback month) before the first day of the Plan Year in which the annuity starting date occurs (stability period). For this purpose, the first, second, and third segment rates are the first, second, and third segment rates which would be determined under Code Section 430(h)(2)(C) if:

(a) Code Section 430(h)(2)(D) were applied by substituting the average yields for the month described in the preceding paragraph for the average yields for the 24-month period described in such section, and

(b) Code Section 430(h)(2)(G)(i)(II) were applied by substituting "Section 417(e)(3)(A)(ii)(II)" for "Section 412(b)(5)(B)(ii)(II)," and

(c) The applicable percentage under Code Section 430(h)(2)(G) is treated as being 20% in 2008, 40% in 2009, 60% in 2010, and 80% in 2011.

14.3 **Applicable mortality assumption.** For purposes of the Plan's provisions relating to the calculation of the present value of a benefit payment that is subject to Code Section 417(e), as well as any other Plan provision referring directly or indirectly to the "applicable interest rate," any Plan provision directly or indirectly prescribing the use of the mortality table described in Revenue Ruling 2001-62 shall be amended to prescribe the use of the applicable annual mortality table within the meaning set forth in Code Section 417(e)(3)(B), as initially described in Revenue Ruling 2007-67.

ARTICLE XV
2009 REQUIRED MINIMUM DISTRIBUTIONS
(IRC SECTION 401(a)(9)(H))

15.1 Notwithstanding anything in the Plan to the contrary:

(a) **Suspension of Required Minimum Distributions for 2009.** A Participant or Beneficiary who would have been required to receive required minimum distributions for 2009 but for the enactment of Code Section 401(a)(9)(H) ("2009 RMDs"), and who would have satisfied that requirement by receiving distributions that are (i) equal to the 2009 RMDs or (ii) one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the Participant, the joint lives (or joint life expectancy) of the Participant and the Participant's designated "Beneficiary, or for a period of at least 10 years ("Extended 2009 RMDs"), will not receive those distributions for 2009 unless the Participant or Beneficiary chooses to receive such distributions. Participants and Beneficiaries described in the preceding sentence will be given the opportunity to elect to receive the distributions described in the preceding sentence; and

(b) **Direct Rollovers.** For purposes of applying the direct rollover provisions of the Plan, a direct rollover will be offered only for distributions that would be eligible rollover distributions without regard to Code Section 401(a)(9)(H).

This amendment is hereby executed this _____ day of _____, 2011

CITY OF GRAND ISLAND, a Nebraska municipality

By: _____

_____, Mayor