



# Valley Advocates for Responsible Development

February 24, 2016

Driggs City Council

60 Main Street

Driggs, Idaho 83422

## **Re: Comments on the “2-5-16” draft of the Best Practices Manual**

Dear City Council Members:

Thank you for the hard work and thoughtful effort being put into this important process, which we all hope will serve as a model for other cities and counties. This is a promising start for a policy manual; however, there are several significant missing portions<sup>1</sup> from the outline originally approved by City Council.<sup>2</sup> This outline touched on several important topics of common concern gleaned from over 15 years of active participation in hearings at the city, county, and state level. In 2014 and 2015 alone, we testified at 45 city and county land use hearings and meetings, submitted 25 formal comment letters on local land

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<sup>1</sup> **Attachment A, Outline of topics for Best Practices Manual.** The sections highlighted in yellow remain unaddressed in the current manual.

<sup>2</sup> **Attachment B. March 17, 2015 Driggs City Council Minutes.** Valley Advocates' Executive Director Shawn Hill attended the March 17, 2015 City Council meeting to discuss the topics to be covered in the City's manual. Having reviewed the minutes and meeting tapes, this outline was presented as an agreement on the content that would be provided in official trainings and the Best Practices Manual. The Council incorporated the outline into their unanimous motion directing staff to draft the manual. Upon discussion of the motion, Councilor August Christensen asked if the motion should include a reference to the outline, to which Councilor Kaufman responded by saying that its inclusion was "implicit," and that the council would be tasked with ensuring that the content therein was sufficiently addressed in the trainings and the manual.



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use issues, and attended 79 local government meetings and hearings. We often interact with the public and receive comments on how intimidating and/or confusing the public process can be. Good city policies can build trust, ensure fair and equitable treatment, and elicit robust, useful, and informative public engagement. That is a win-win for everyone.

### **Comment on the overall structure of the manual:**

The need for this policy manual was born from a series of large land use hearings where the public perceived (rightly or wrongly) that the City was deliberately seeking to limit public input and comment on important details of the developments, placing roadblocks to access to public materials, failing to make important applicant submissions available to the public, and disparaging public comment. Much of this may have arisen from the City's efforts to accommodate demands of the applicant. The result was negative for all participants, and was detrimental to the work timeline of the applicant. Clear rules and guidelines need to be set to guide the public, make clear to the applicant that the rules assuring public disclosure and participation cannot be overlooked when inconvenient, and to provide protection for the City staff from undue political pressures.

In styling and shaping this manual, we encourage the City to consider future applications and opportunities to build openness and trust with the public, rather than ratifying the City's past conduct. As written, the manual addresses important issues, but lacks clear guidelines. Staff, officials, applicants, and the public will all benefit from tighter, unambiguous language. **Here are a few of the recommended changes we have redlined in the attached document:**<sup>3</sup>

- **Late submittals.** The manual should include firm deadlines and policies regarding late submittals from the applicant, particularly with regard to new materials presented at public hearings.

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<sup>3</sup> **Attachment C: Redlined version of the Best Practices Manual 2-5-16.**



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- **Comments received after the 1-week deadline.** It seems reasonable that copies of these comments will be provided to the decision makers at hearing. To ensure fairness, the policy here should match the City's policy regarding late submittals from the applicant.
- **No hearsay.** No hearsay or unattributed comments shall be accepted from the public, the applicant, or the decision makers.
- **No physical address requirement for public comment.** Most public comments are submitted via email; it is not realistic or necessary to require a physical address in order for a public comment to be accepted. This requirement will result in most comments being disallowed, which will then discourage further public participation.
- **Criteria for when staff act as advocates.** The city needs clear criteria for when a staff person acts as an advocate for or against an application. When they are acting in an advocacy role, it should be made clear to the decision makers, the applicant, and the public.
- **Unintended consequences of the "group spokesperson" requirement.** This standard will prove to be cumbersome and unworkable. For example, it will apply to all of the following who seek to offer valuable testimony at a hearing or meeting: cities, counties, state agencies, federal agencies, taxing districts, nonprofit organizations, and all loosely affiliated organizations. Should the city not fairly, impartially, and equitably apply these standards to every organization at every hearing, it will open itself up to liability.
- **Three minute time limitation:** This time limitation has been upheld but criticized by the Idaho Courts. It does not create an air of trust or equal treatment, and from the perspective of the citizenry, the decision makers are often perceived to be watching the timer rather than listening to the person offering testimony. It would help if there were clear standards for when the 3 minute limitation is used.



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- **A record of legal advice.** If advice from the City Attorney is going to be deemed the “final interpretation of the law,” and City officials will be entirely indemnified by the City if they follow the attorney’s advice, that advice needs to be provided contemporaneously to all council members, in writing, and to the public. For example, Teton County’s attorney often prepares written memoranda to provide guidance and legal opinions.
- **Personal commentary.** “Best practices” should include acknowledging that personal comment is not appropriate in public service. Officials shall not comment outside of public meetings regarding any public records requests or on public comments received in quasi judicial matters.
- **There can be no “average hourly costs” on Public Records Requests.** Idaho Code § 74-102 provides: The fees established “may not exceed the actual cost to the agency of copying the record . . . . No lump sum costs shall be assigned to any public records request.”<sup>4</sup>
- **Fee exemptions.** This draft should include the fee exemptions expressly provided in I.C. § 74-102 (10) (F) of the Public Records Act.
- **Tighter language.** Overall, the proposed policy language is very loosely written. For example, the draft often uses “should,” “perhaps,” and “may” when the proper and less ambiguous term is “shall”. Statutory language and the Attorney General handbooks provide good examples of succinct writing.
- **Enabling authority.** The manual should refer to state code or city ordinance giving enabling authority for each section.

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<sup>4</sup> See also: Attorney General’s Legal Guideline, January 25, 1993 (city may not pass ordinance to allow it to charge a fee in excess of the actual cost of reproducing requested public records despite the “otherwise provided by law” language of Idaho Code § 9-338(8)).



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- **Consistency with state statutes.** We have noted where the policy manual is weaker than state statute or runs contrary to the provisions in Jerry Mason and Jim McNall's training materials to the city.
- **Signature page:** There needs to be a page added at the end that is signed and dated by the recipient of the manual acknowledging that he or she has read and understands the manual and will do their best to follow it.
- **Adoption via resolution.** The Council should pass a resolution that the policy is to be considered rules of conduct for all City employees until modified by a vote of the Council.

### **Crafting exemplary policy with regard to Mayoral roles.**

We are concerned with the functional problems that arise unnecessarily from the conflicting dual roles ascribed to the administrative office of the Mayor which are tenuously positioned to include ex parte communications, even when these communications are not procedurally needed. Driggs has developed a large professionally trained staff for the quasi-judicial proceedings that most frequently arise: land use decisions. That staff should have independent and principal responsibility for developing and reviewing applications.

We ask the City to recognize that in "best practices," the decision makers receive and evaluate, but absolutely do not influence, the professional staff's assembly and analysis of the applicant's submissions, public comments, City standards, etc.

#### a) Ex Parte Communications

With Driggs' large professional staff, there is no need for it to be "understood" that the Mayor "will reasonably be involved in or have oversight" over quasi-judicial applications and concept development of projects. This is a staff function. Furthermore, we have never observed a Mayor assume these roles under any other city administration.

The draft also refers to establishing "terms negotiated" outside of open meetings, through ex parte communications regarding a quasi judicial



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application. The Idaho Supreme Court has been clear that “actual bias of a decision maker is constitutionally unacceptable.” *Ferguson v. Board of Trustees of Bonner County School Dist. No. 82*, 98 Idaho 359, 365, 564 P.2d 971, 977 (1977). Actual bias is demonstrated when a decisions maker has “definitely indicated his predetermination on the question” presently before him. *Floyd v Board of Commissions of Bonneville County*, 137 Idaho 718, 52 P.3d 863, 870 (2002).

The draft also notes, “This is the reality of the political structure and does not constitute a legal conflict or imply bias.” Again, this is treading a very tenuous, unnecessary, and unrealistic line. It is not in keeping with established Idaho case law.

### b) Recusal

We are concerned that recusal policies throughout this draft policy manual are not congruent with Idaho case law, or consistently applied. We recommend the following:

- All decision makers, including the Mayor, shall disclose ex parte communications at the beginning of every hearing. Recusal of a decision maker needs to be from processing, deliberating, and voting on all matters pertaining to that particular applicant. To recuse oneself only from casting a vote would clearly be an insufficient remedy per Idaho case law.<sup>5</sup>
- If the Mayor or other decision maker forgoes participation in the discussion, he or she should leave the bench and let the Chair or Vice-

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<sup>5</sup> *Manookian v. Blaine County*, 112 Idaho 697, 735 P.2d 1008 (1987) (Commissioners participated in the zoning proceedings right up until the last minute before disqualifying themselves still violated due process); *Huber v Fremont County*, CV-2011-215, April 30, 2012. (Planning Administrator and County Commissioners were disqualified from having any involvement, direct or otherwise from any proceeding related to a pending land use application).



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Chair of the Council facilitate the proceedings. That is standard practice in other jurisdictions, including Teton County.

- It is unclear why the section on disclosure of ex parte communications and recusal of decision makers does not match the previous section regarding the disclosure and recusal of the Mayor. All disclosures should be at the beginning of the hearing, rather than only just before voting. If decision makers are recusing themselves, they must leave the bench for discussion, deliberation, and voting. This would include the Mayor.

### Conclusion:

The goal is to have a formal policy guide that everyone will follow and to harmonize the Valley political entities behind a common set of practices. Driggs has taken a very important first step here, but we believe further substantive edits will strengthen the document, improve civic discourse, and create significant and lasting impacts to further good governance. We greatly appreciate the opportunity to respond to the draft best practices manual and look forward to continued efforts toward transparent and responsible decision making.

Sincerely,

/S/ Janna Rankin

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Board President

/S/ Julie Stomper

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