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INCREASING PRODUCTIVE COMMUNICATION IN LOCAL GOVERNMENT AND DECREASING BARRIERS TO COMMUNITY INTERACTIONS

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I. INTRODUCTION

Minnesota has traditionally been a leader in civic engagement.¹ Its statutes reflect that, with an extensive system of local government bodies² and an equally extensive framework of “sunshine” laws³ designed to promote public access to the information those local governments use to make decisions.⁴

However, political conflict is increasing at all levels. As it does, local governments face pressure to further engage both local officials and the public in constructive conversations. The goal of these conversations is to lead to a shared sense of ownership of public policies and confidence that those policies have been shaped by a robust dialogue involving the entire community. This article, which was inspired by the Hamline University School of Law (now Mitchell Hamline School of Law) Dispute Resolution Institute’s Symposium, *An Intentional Conversation about Public Engagement and Decision-Making: Moving from Dysfunction and Polarization to Dialogue and Understanding*, focuses on how that can take place within Minnesota cities. It provides a broad overview

1. See, e.g., *Volunteering and Civic Engagement in Minnesota*, CORP. FOR NAT’L & CMTY. SERV., <http://2013.volunteeringinamerica.gov/MN> (last visited Aug. 11, 2016) (showing that in 2013, Minnesota ranked third in terms of volunteer hours per capita); NAT’L CONFERENCE ON CITIZENSHIP, 2009 MINNESOTA CIVIC HEALTH INDEX 1, 3 (2009), <http://ncoc.net/index.php?download=114kcf1078> (“Minnesota showed civic resilience in a year when much of the nation saw a sharp drop in civic effort.”).

2. The 2012 Census of Governments, the most recent data available, showed Minnesota with 3,633 general and special purpose local governments, the eighth-highest number in the country, surpassed only by California, Illinois, Kansas, Missouri, Ohio, Pennsylvania, and Texas. U.S. DEP’T OF COM., 2012 CENSUS OF GOVERNMENTS 1, 145 (2012), <http://www2.census.gov/govs/cog/2012isd.pdf>.

3. For a general description of sunshine laws and their purposes, see *Sunshine Laws*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/first-amendment-handbook/sunshine-laws> (last visited Aug. 11, 2016).

4. The Minnesota Open Meeting Law was adopted in 1957. 1957 Minn. Laws 1043. The Minnesota Government Data Practices Act was originally enacted in 1975. 1974 Minn. Laws 1199. Language added in 1978 made data public by default. 1979 Minn. Laws 911.

of municipal organization within the state and the applicable rules under which cities operate. Within that context, the article then considers one form of dialogue, direct public engagement, with the goal of gleaning what we can from the research about how to do it well, and making recommendations for the future.

II. CITY STRUCTURE IN MINNESOTA

Minnesota is the land of (more than) 10,000 local officials. In fact, as of 2012 Minnesota had 1,784 organized towns, 853 cities, 87 counties, 343 public school districts, not to mention local agencies, such as: hospitals, watershed districts, housing, redevelopment and economic development authorities, planning and utility commissions, park boards, and a panoply of other special purpose entities,⁵ one of the highest number of local governments of any state in the country.⁶

Organizationally, those governments take a number of forms. General purpose entities, like towns, cities, and counties, generally rely on elected officials.⁷ On the other hand, with the notable exception of school districts—which have elected directors⁸—special purpose entities are more likely to have appointed officials.⁹

Even within a type of local government, however, there can be fairly significant differences in the way they are structured. This is especially pronounced within cities. In addition to being identified as a first, second, third, or fourth class city, each of which have slightly different powers,¹⁰ a Minnesota city can be organized as a Standard plan,¹¹ Plan A,¹² Optional Plan B,¹³ or charter city.¹⁴

5. See generally LEAGUE OF MINN. CITIES, HANDBOOK FOR MINNESOTA CITIES: CHAPTER 1—LOCAL GOVERNMENT IN MINNESOTA (July 22, 2015), <http://lmc.org/media/document/1/chapter01.pdf?inline=true>.

6. 2012 CENSUS OF GOVERNMENTS, *supra* note 2, at 145.

7. MINN. STAT. § 205.07 (2014) (providing for election of city council members); MINN. STAT. § 205.075 (2014) (providing for election of town board members); MINN. STAT. § 375.025, subdiv. 4 (2014) (discussing election of county commissioners).

8. See generally MINN. STAT. § 205A (2014).

9. See, e.g., MINN. STAT. § 469.003, subdiv. 6 (2014) (“The commissioners shall be appointed by the mayor, with the approval of the [city council].”); MINN. STAT. § 473.123, subdiv. 3(a), (e) (2014) (providing that the governor appoints Metropolitan Council commissioners “subject to the advice and consent of Minnesota Senate”).

10. MINN. STAT. § 410.01 (2014).

11. A Standard Plan city has a mayor, three or five councilmembers, and an

Notwithstanding these differences, though, most cities in Minnesota rely on a weak-mayor form of government.¹⁵ In other words, while the mayor has certain additional duties, such as running meetings,¹⁶ making certain appointments,¹⁷ and executing documents,¹⁸ he or she is for most purposes simply another member of the city council, with no greater or lesser powers than other council members.

elected clerk who serves as a voting member of the council. The treasurer is also an elected official, but is not a member of the council. The positions of clerk and treasurer may be combined. MINN. STAT. § 412.541 (2014). There are currently 96 Standard Plan cities. LEAGUE OF MINN. CITIES, HANDBOOK FOR MINNESOTA CITIES: CHAPTER 3—THE STATUTORY CITY 3 (July 27, 2015), <http://www.lmc.org/media/document/1/chapter03.pdf?inline=true>.

12. Except during its initial period of operation, a Plan A city has a mayor and four or six council members as well as an appointed clerk and treasurer. MINN. STAT. § 412.581 (2014). For more details about Plan A cities, see generally MINN. STAT. § 412.572 (2014) (converting to a Plan A city); *id.* § 412.591 (providing the clerk and treasurer positions may be combined); *id.* § 412.541, subdiv. 1 (describing clerk and treasurer appointments, and council member elections). There are currently 633 Plan A cities. HANDBOOK FOR MINNESOTA CITIES: CHAPTER 3, *supra* note 11, at 4.

13. An Optional Plan B city has a mayor and four or six councilmembers, an appointed clerk and treasurer, and an appointed city manager who has broad authority over the city's administrative affairs. MINN. STAT. § 412.631 (2014) (describing the composition of the city council); *id.* § 412.611 (describing the role of the city manager); *id.* § 412.641 (describing the process of choosing a city manager); *id.* § 415.16 (describing city and county employment). There are currently 17 Optional Plan B cities. HANDBOOK FOR MINNESOTA CITIES: CHAPTER 3, *supra* note 11, at 5.

14. A charter city operates under a home rule charter that effectively serves as a local constitution, within the confines of generally applicable state law. *See* MINN. STAT. § 410.16 (2014). There are currently 107 charter cities. LEAGUE OF MINN. CITIES, HANDBOOK FOR MINNESOTA CITIES: CHAPTER 4—THE HOME RULE CHARTER CITY 1 (July 27, 2015), <http://www.lmc.org/media/document/1/chapter04.pdf?inline=true>.

15. Only three cities in Minnesota use a strong-mayor council form of government. HANDBOOK FOR MINNESOTA CITIES: CHAPTER 4, *supra* note 14, at 4

16. MINN. STAT. § 412.191, subdiv. 2 (2014).

17. Most, but not all appointments require council consent. *See, e.g.*, MINN. STAT. § 412.501 (2014) (providing that a mayor may appoint park board member with council consent); *but cf.* MINN. STAT. § 12.25, subdiv. 1 (2014) (establishing that a mayor may unilaterally appoint director of local organization for emergency management).

18. MINN. STAT. § 412.201 (2014).

III. CONFLICT WITHIN CITIES

Cities invest significant resources when attempting to create public engagement. At the same time, there are times when public participation may not be particularly helpful. This is perhaps most noticeable when there is serious conflict within city hall, either among council members or between council members and staff members.

The causes of that conflict can vary widely. It may be personal—people who dislike each other. It may be based in policy differences—people who have very different visions for their community. And sometimes it may be exacerbated by the structure of the government itself.

Consider the weak-mayor system, the predominant form of city government in Minnesota. It is often very successful, but it can lead to friction between a mayor and council members. Sometimes, this is because a mayor believes he or she was elected to “lead” the city and implement a specific policy agenda, while the council members believe they have an equal mandate for their platforms. Sometimes it is the result of a mayor whose use of his or her limited prerogatives, such as making appointments, creates conflict with council members who were not consulted beforehand or who disagree with the mayor’s decisions. Sometimes, this is because mayoral meeting management styles can cause problems: a dictatorial approach that ruffles feathers, an overly relaxed attitude that allows meandering and frustrating discussions, or countless other issues that can arise when a group of people have to publicly discuss difficult and contentious matters.

Friction can also arise because council members do not give appropriate recognition to the special role of a mayor, even in a weak-mayor system. Citizens and the media expect the mayor to speak on behalf of the city, especially during emergencies or other times of crisis.¹⁹ Competing voices can create confusion among the public and irritation among officials. Council members might reject a mayor’s recommended appointments, not for substantive reasons but simply as a display of their own power. A mayor’s attempts to plan and manage a meeting agenda might be publicly

19. See generally LEAGUE OF MINN. CITIES, MINNESOTA MAYORS HANDBOOK 9 (Apr. 2013), http://www.lmc.org/media/document/1/mayors_hdbk.pdf?inline=true.

undermined by council members looking to leech public support away from the mayor.

Regardless of the cause of their disagreements, there are no clear legal guidelines as to how they should be resolved. Instead, there is an implicit expectation that the mayor, council, staff, and the public will operate with consensus, or at least courtesy, and find some sort of acceptable solution. And for the most part, that is what takes place. Elected officials constantly negotiate, compromise, and vote against each other, all while maintaining respectful and oftentimes friendly relationships.²⁰

On occasion, however, situations deteriorate to the point where the level of conflict among city officials reaches a level that has a significant negative impact on the organization's ability to conduct business. While there is no bright line to determine exactly when that occurs, it is fair to say that dysfunction in municipal government exists when a city is repeatedly unable to adequately perform one or more of its critical, ongoing governmental functions. This includes, but is not limited to, conducting meetings in a professional manner, making decisions in a timely and reasonable way, providing essential public services, managing employment relationships, interacting with the public, and working with third parties.

The costs of this conflict can be substantial. Technology means that stories about disagreements and discord that might have once been known only to those relatively few citizens who personally attended council meetings are now available to anyone with an internet connection.²¹ Besides the personal embarrassment city

20. The friendship between Senators Paul Wellstone and Jesse Helms is a well-known example of this dynamic. Nick Anderson, *Paul Wellstone, Fierce Fighter for His Beliefs*, L.A. TIMES (Oct. 26, 2002), <http://articles.latimes.com/2002/oct/26/nation/na-wellstone26>.

21. See, e.g., Chris Henry, *Discord with Council Mars Port Orchard Mayor's First Year in Office*, KITSAP SUN (Jan. 26, 2013), <http://www.kitsapsun.com/news/local/discord-with-council-mars-port-orchard-mayors-first-year-in-office-ep-416692348-356303671.html>; Tomoya, Shimura, *Lake Forest Hands Off Mayor's Gavel, But Discord Persists*, THE ORANGE COUNTY REGISTER (Dec. 22, 2015), <http://www.ocregister.com/articles/mayor-697120-hamilton-city.html>; Emily Wilkins, *Disagreements Over Issues Cause Some Discord on Bryan City Council*, THEEAGLE.COM (Jan. 25, 2015), http://www.theeagle.com/news/local/disagreements-over-issues-cause-some-discord-on-bryan-city-council/article_6152f250-13dd-54b2-8c27-1fe74e884068.html.

officials suffer from this sort of exposure,²² it can have a serious negative impact on the image the city presents to the world.²³

In addition to these indirect costs, city council conflicts can lead to other significant financial consequences. In one instance from several years ago, acrimony among the council members of a Minneapolis-St. Paul suburb led to staff turnover and litigation, the costs of which exceeded \$800,000. The difference was ultimately borne by other members of the League of Minnesota Cities Insurance Trust, a self-insurance pool for Minnesota municipalities.²⁴ Ultimately, the city was forced to find other, more expensive liability coverage until it was able to demonstrate a period of stability.²⁵ Another Minnesota city faced a similar situation after incurring liability costs and damages well in excess of \$1,000,000 as the result of bitter disputes that led to employment and other litigation.²⁶

Although these are extremes, they are far from the only examples. A recent League of Minnesota Cities and Minnesota City/County Management Association Joint Task Force Report on Civility cited a number of instances of conflict spilling into public view, accompanied by the types of problems that are sadly

22. Jeremy Gray, *Birmingham Mayor William Bell, Councilman Marcus Lundy Taken to Hospital After Fight*, AL.COM (Dec. 15, 2015), http://www.al.com/news/birmingham/index.ssf/2015/12/birmingham_mayor_william_bell_18.html.

23. See, e.g., Christiana McFarland & Katie Seeger, *The Role of Elected Officials in Economic Development*, NAT'L LEAGUE OF CITIES, (2010), http://www.iedconline.org/clientuploads/Downloads/edrp/IEDC_NLC_Elected_Officials.pdf; Susan Berg, *Tempers, Discord Flare at Development Meeting*, PEABODY GAZETTE-BULLETIN (July 15, 2009), http://peabodykansas.com/direct/tempers_discord_flare_at_development_meeting+42mcedc+54656d706572732c20646973636f726420666c61726520617420646576656c6f706d656e74206d656574696e67.

24. Herón Márquez Estrada, *League Drops City Insurance for Greenfield*, STAR TRIB. (Nov. 4, 2009), <http://www.startribune.com/league-drops-city-insurance-for-greenfield/69251547/>.

25. Herón Márquez Estrada, *Voter Revolt? City of Greenfield Digs Itself Deeper*, STAR TRIB. (Nov. 12, 2009), <http://www.startribune.com/voter-revolt-city-of-greenfield-digs-itself-deeper/69816202/>.

26. Emma L. Carew, *Maplewood Beginning to Shed Unwanted Reputation*, STAR TRIB. (Nov. 23, 2010), <http://www.startribune.com/maplewood-beginning-to-shed-unwanted-reputation/110273624/>; Alex Davy, *League of Minnesota Cities Jacks Up Maplewood Insurance Rates*, LILLIE NEWS.COM (May 5, 2008), <http://www.eastsidereviewnews.com/content/league-minnesota-cities-jacks-maplewood-insurance-rates>.

predictable in these situations.²⁷ While recognizing that “[l]ively debate on the issues has always been a hallmark of democratic government,” the report goes on to note that “there seems to be an increasing number of cities and counties in the news where things have deteriorated to the point where relationships and interactions between people have become toxic.”²⁸

Some of those conflicts resolve themselves naturally, whether through people learning to work together or an election changing the makeup of the council. Other times, however, outside assistance can play a vital role in helping a city council find a more productive way to work together.

In fact, many people involved with city government have explored different ways to resolve conflict on city councils. The Minnesota Association of City Attorneys has sponsored education on this topic for its members, who are often put in the role of facilitator.²⁹ The League of Minnesota Cities and the Minnesota City/County Managers Association have also devoted a good deal of resources to education about incivility and conflict resolution.³⁰

The Minnesota State Office for Collaboration and Dispute Resolution has taken an active role in working with city councils involved in seemingly intractable disputes, by providing direct services and by arranging for other dispute resolution experts to become involved.³¹

27. LEAGUE OF MINN. CITIES, LEAGUE OF MINNESOTA CITIES AND MINNESOTA CITY/COUNTY MANAGEMENT ASSOCIATION JOINT TASK FORCE REPORT ON CIVILITY 1–2 (2014), <http://www.lmc.org/media/document/1/civilitytaskforcereport.pdf?inline=true>.

28. *Id.* at 3 (citing John Derksen, *Pequot Lakes v. Sibley Township: The Hidden Story*, BRAINERD DISPATCH (Aug. 6, 2013), <http://www.brainerddispatch.com/content/pequot-lakes-v-sibley-township>; Ryan Howard, *Lexington Council, Staff Butt Heads*, STAR TRIB. (June 4, 2013); Paul Levy, *Idyllic Dayton Is Hit by Some Rough Times*, STAR TRIB. (Aug. 6, 2013), <http://www.startribune.com/idyllic-dayton-is-hit-by-some-rough-times/218619271/>).

29. *See generally* MINNESOTA ASS’N OF CITY ATT’YS, MINNESOTA CITY ATTORNEY’S EDUCATIONAL CONFERENCE (Feb. 9, 2013), <http://prosecution.ci.coon-rapids.mn.us/TCPGroup/Docs/CAUpdate/Current.pdf>.

30. *See generally* LMC/MCMA Civility Task Force, LEAGUE OF MINN. CITIES, <http://www.lmc.org/page/1/civilitytaskforce.jsp> (last visited Aug. 11, 2016).

31. *See, e.g.*, Erin Hinrichs, *North St. Paul City Council Begins Dispute Resolution Process; Thorsen Stays on the Sidelines*, LILLIENEWS.COM (Apr. 8, 2015), <http://www.lillienews.com/articles/2015/04/08/north-st-paul-city-council-begins-dispute-resolution-process-thorsen-stays>; Derrick Knutson, *NB Council Votes to Move Forward with Resolution Dispute Program*, THE POST REV. (June 17, 2015),

The increased reliance on formal dispute resolution techniques, and the involvement of people trained in them, bodes well for the ability of Minnesota cities to find more constructive ways to resolve disagreements among council members. Unfortunately, Minnesota law creates unintended but real impediments to these initiatives.

IV. MINNESOTA'S SUNSHINE LAWS

Minnesota has a wide variety of statutes governing public participation in governmental decision-making. While some of these statutes take the form of a public hearing or notice requirements in specific situations, such as land use planning and regulation,³² others, specifically the Minnesota Open Meeting Law³³ (OML) and the Minnesota Government Data Practices Act (MGDPA),³⁴ create a broad framework governing the day-to-day activities of governmental entities and officials.

A. *The OML*

The OML generally requires that all meetings of public bodies, including cities and their related entities, must be open to the public.³⁵ This presumption of openness serves three vital purposes:

- 1) it prohibits actions from being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning decisions of public bodies or detect improper influences;³⁶
- 2) it ensures the public's right to be informed;³⁷ and
- 3) it gives the public an opportunity to present its views to the public body.

<http://ecmpostreview.com/2015/06/17/nb-council-votes-to-move-forward-with-resolution-dispute-program/>; Joshua Nielsen, *Lake Elmo Council Seeks Help of Conflict Resolution Specialist*, LILLIENEWS.COM (July, 29, 2015), <http://www.lillienews.com/articles/2015/07/29/lake-elmo-council-seeks-help-conflict-resolution-specialist>.

32. See, e.g., MINN. STAT. § 462.355, subdiv. 2 (2014) (requiring a public hearing before adoption or amendment of a comprehensive plan).

33. See generally MINN. STAT. § 13D (2014).

34. MINN. STAT. ch. 13 (2014).

35. MINN. STAT. § 13D.01 (2014).

36. *Rupp v. Mayasich*, 533 N.W.2d 893, 894 (Minn. Ct. App. 1995).

37. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 4 (Minn. 1983).

The law applies to any meeting of a quorum of a covered entity's governing body, which in the case of a statutory city council, city board or commission,³⁸ means a majority of the members. Although the OML does not generally apply in situations where less than a quorum is involved, these smaller gatherings may be subject to the OML if they are designed to avoid its intent, as in the case of serial meetings of overlapping smaller groups.³⁹ Committees and subcommittees of a governing body are also covered if they have been delegated decision-making authority,⁴⁰ although not all gatherings of a quorum constitute a meeting under the OML.⁴¹ While the statute does not define the term, the Minnesota Supreme Court has ruled that meetings are "gatherings of a quorum or more of the members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body."⁴² A social gathering is therefore not considered a meeting, as long as the officials refrain from discussing prohibited topics, which, given the realities of small town life, is the only way many of these communities could function.⁴³ Generalized training sessions are also not meetings for purposes of the statutes, provided that the particular business of the city is not discussed.⁴⁴ In general, though, the courts have broadly construed this statute in favor of public access.⁴⁵

38. MINN. STAT. § 412.191, subdiv. 1 (2014) (noting home rule charter cities may have different quorum requirements).

39. *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983) (en banc).

40. *See Sovereign v. Dunn*, 498 N.W.2d 62, 63 (Minn. Ct. App. 1993) (holding attendance of two of five councilmembers at private mediation did not violate OML because they did not have power to make decisions).

41. In an unpublished opinion, the Minnesota Court of Appeals concluded that e-mail communications are not a meeting for purposes of the OML. *O'Keefe v. Carter*, 2012 Minn. App. Unpub. LEXIS 1248 *20. The Supreme Court had earlier suggested that telephone conversations could constitute a meeting. *Moberg*, 336 N.W.2d at 518. The extent to which gatherings must be in person to constitute a "meeting" remains in some question.

42. *Moberg*, 336 N.W.2d at 518; *see also St. Cloud Newspapers, Inc.*, 332 N.W.2d at 6.

43. *St. Cloud Newspapers, Inc.*, 332 N.W.2d at 7.

44. Op. Minn. Att'y Gen. 63a-5 (Aug. 17, 1996), <http://www.ag.state.mn.us/office/Opinions/63a5-19960828.pdf>

45. *Merz v. Leitch*, 342 N.W.2d 141, 145 (Minn. 1984); *see also Prior Lake*

That is not to suggest that every meeting must be open. The law sets out seven situations in which a meeting may be closed:

- 1) labor negotiations under the Minnesota Public Employment Relations Act;⁴⁶
- 2) performance evaluations of a city employee;⁴⁷
- 3) when authorized by attorney-client privilege;⁴⁸
- 4) purchase or sale of property;⁴⁹
- 5) security briefings and reports;⁵⁰
- 6) preliminary consideration of allegations or charges against a city employee;⁵¹ and
- 7) discussion of certain not public data.⁵²

American v. Mader, 642 N.W.2d 729 (Minn. 2002) (en banc) (cautioning against unfettered application of the attorney-client exception when considering public access to public affairs). The court in *Mader* noted:

The attorney-client exception discussed herein would almost never extend to the mere request for general legal advice or opinion by a public body in its capacity as a public agency. We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated, for this court has consistently emphasized that respect for and adherence to the First Amendment is absolutely essential to the continuation of our democratic form of government. It will be upheld, however, if the balancing of these conflicting public policies dictates the need for absolute confidentiality. The exception is therefore available to satisfy the concerns expressed herein but is to be employed or invoked cautiously and seldom in situations other than in relation to threatened or pending litigation.

Id. at 736–37. *But cf.* *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435 (Minn. Ct. App. 2005) (recognizing that the mere threat of litigation can be enough to justify closing a meeting under the attorney-client privilege exception).

46. MINN. STAT. § 13D.03 (2014).

47. *Id.* § 13D.05, subdiv. 3(a).

48. *Id.* § 13D.05, subdiv. 3(b).

49. *Id.* § 13D.05, subdiv. 3(c).

50. *Id.* § 13D.05, subdiv. 3(d).

51. *Id.* § 13D.05, subdiv. 2(b) (establishing if the city council finds that discipline is needed as a result of these specific allegations, then “future meetings or hearings relating to these specific allegations . . . must be open”).

52. *Id.* § 13D.05, subdiv. 2(a) (including “data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults; . . . internal affairs data relating to allegations of law enforcement personnel misconduct” or active law enforcement investigative data; “educational data, health data, medical data, welfare data or mental health data that are not-public data;” and certain medical records).

Compliance with the law is important. Penalties for an individual who intentionally violates the OML range from a \$300 civil penalty up to removal from office for three separate violations.⁵³ Attorney fees and costs may also be awarded to a prevailing plaintiff.⁵⁴

B. *The MGDPA*

The MGDPA⁵⁵ is intended to balance the public's right to know what government is doing, individuals' right to privacy, and the government's need to function responsibly and efficiently.⁵⁶ Most state and local government entities in Minnesota are bound by it,⁵⁷ including cities⁵⁸ and most city-related entities, such as planning commissions, park boards and other advisory boards, housing and redevelopment authorities, and economic development authorities.⁵⁹

At its core, the MGDPA regulates how cities manage government data, which is defined as "all data collected, created, received, maintained, or disseminated" by a covered governmental entity "regardless of physical form, storage media, or conditions of use."⁶⁰ The types of data regulated by the MGDPA are not limited to the paper files at city hall, but include computerized files, e-mails, photographs, charts, maps, videotapes, audio tapes, handwritten notes, and working documents.

Under the MGDPA, government data is presumed to be public unless there is a specific state statute, federal law, or temporary classification⁶¹ that classifies the data otherwise.⁶² "Public data" is

53. MINN. STAT. § 13.085 (2014) (\$300 dollar fine); *id.* § 13.09 (just cause for removal of office).

54. *Id.* § 13.085 subdiv. 6.

55. *See generally* MINN. STAT. ch. 13 (2014).

56. LEAGUE OF MINN. CITIES, DATA PRACTICES: ANALYZE, CLASSIFY, RESPOND 1, (Apr. 16, 2015), <http://www.lmc.org/media/document/1/datapractices.pdf?inline=true>.

57. The most notable exception are townships, most of which are not within the statute's definition of government units to which the statute applies. MINN. STAT. § 13.02 (2014).

58. MINN. STAT. § 13.01, subdiv. 1. (2014). The MGDPA applies to other government units, including certain types of townships, counties, school districts, and the state. *Id.* § 13.02, subdiv. 7a, 11.

59. *Id.* § 13.02, subdiv. 11.

60. *Id.* § 13.02, subdiv. 7.

61. MINN. STAT. § 13.06, subdiv. 3 (2014) (establishing that the

accessible to anyone for any reason.⁶³ The MGDPA “establishes a presumption that government data [is] public and [is] accessible by the public for . . . inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data [is] not public.”⁶⁴

There are a number of exceptions set forth in the statutes, but those generally relate to things such as investigative, personnel, medical, and other data containing sensitive information.⁶⁵ Data classified as private⁶⁶ or nonpublic⁶⁷ are not accessible to the public, but may be accessed by (1) the subject of the data,⁶⁸ (2) individuals within the city “whose work assignments reasonably require access,”⁶⁹ (3) outside entities or agencies that are authorized by state or federal law to access that specific data,⁷⁰ or (4) entities or individuals given access by the express written direction of the data subject.⁷¹

Commissioner of the Department of Administration determines temporary classifications.)

62. *Id.* § 13.06. However, with city personnel data the presumption is reversed, and all personnel data is presumed to be private unless a specific state statute or federal law classifies it as public. *See id.* § 13.43 (Supp. 2015).

63. *Id.* § 13.03, subdiv. 1 (Supp. 2015). Cities cannot require those requesting public data to state the reason why they want access to the data or justify the request. *Id.* § 13.05, subdiv. 12.

64. MINN. STAT. § 13.01, subdiv. 3 (2014). Most towns are excluded from the reach of the MGDPA because it is not considered “Political Subdivision” under the statute. *Id.* § 13.02, subdiv. 11.

65. *See generally* MINN. STAT. ch. 13 (2014 & Supp. 2015).

66. *Id.* § 13.02, subdiv.12 (establishing that “private data” is data on individuals).

67. *Id.* § 13.02, subdiv. 9 (establishing that “nonpublic data” is data not on individuals).

68. *Id.*

69. MINN. R. 1205.0400, subdiv. 2 (2015). For example, a city could share the reason for an administrative leave with city council, even though it is private data; if the city council members’ work assignments reasonably required access to this data. Minn. Dept. of Admin. Adv. Op. 99-019 (1999), <http://www.ipad.state.mn.us/opinions/1999/99019.html>. A conservation district could also share the identity of the person who made a property complaint, which is confidential data, with the conservation district board members if their work assignments reasonably required access to this data. Minn. Dep’t. of Admin. Adv. Op. 02-044 (2002), <http://www.ipad.state.mn.us/opinions/2002/02044.html>.

70. MINN. R. 1205.0400, subdiv. 2 (2015).

71. *Id.*

Similarly, the public is not allowed access to data that is classified as confidential⁷² or protected nonpublic⁷³ by state or federal law or temporary classification.⁷⁴ In those cases, access is limited to individuals within the city whose work assignments reasonably require access, and outside entities and agencies authorized by state or federal law to access that specific data.⁷⁵

Again, compliance is important. Potential consequences for an individual who violates the MGDPA can include civil damages and misdemeanor charges.⁷⁶ Governmental entities can also face civil suits.⁷⁷

C. Implications

In short, there is a general expectation in Minnesota that the business of public entities will be conducted in public, with no exception for conversations or information that might simply be embarrassing or unpleasant to deal with in front of the world at large. In reality, though, mediation and other forms of alternative dispute resolution do not work as well when conducted in public. There is a reason that judges do not conduct settlement conferences in public and that mediation discussions cannot be used at trial.⁷⁸

Furthermore, if a situation in a city has deteriorated to the point that some sort of mediation or facilitated conversation is necessary, the local media is often thoroughly covering the story. When that happens, particularly if a reporter is looking for a provocative hook, it can be very difficult for an already-irritated individual to avoid taking the opportunity to publicly lash out at a political opponent.

In a private setting, a mediator can gather the parties, meet with them together and separately, convey possible resolutions back and forth, and generally use whatever approach he or she thinks is

72. MINN. STAT. § 13.02, subdiv. 3 (2014) (establishing that “Confidential data” is data on individuals).

73. *Id.* § 13.02, subdiv. 13 (noting that “Protected nonpublic data” is data not on individuals).

74. *Id.* § 13.02, subdiv. 3, 13.

75. MINN. R. 1205.0600, subdiv. 2 (2015).

76. MINN. STAT. § 13.09 (2014).

77. *Id.*

78. *See id.* § 595.02, subdiv. 1(m); MINN. GEN. R. PRACTICE 114.07, 114.08 (2016).

most effective. That becomes difficult or impossible in a room full of observers, many of whom may be allied with one or the other side to the dispute.

What can be done to address these problems? While solutions are not without controversy, they are also not without precedent. For example, a state agency could be given authority to permit closing a meeting in order to engage in intra-council mediation. Or, meetings could be closed for this purpose with the requirement that a summary be provided when the mediation concludes, a process modeled on the existing requirements for closing a meeting for personnel evaluations.⁷⁹ Ultimately, the opportunity to meet face-to-face and have difficult conversations about ways to improve challenging interpersonal relationships would be of great value to the public officials involved as well as the people they serve. While there is assuredly a need for public business to get done in the sunshine, there is also a need for public business to simply get done.

These changes would not be a panacea and other obstacles would remain. Most obviously, a city council *has* to meet on a regular basis to conduct the business of the city.⁸⁰ In a different venue, a mediator might recommend that the parties refrain from interacting for a period of time, giving them time to cool off and allowing the mediator to create a series of structured interactions designed to avoid unguided debates over whatever is behind the disagreement. The need for regular council meetings means that council members cannot avoid each other for long. With no practical way for a mediator to be involved in the council meeting itself, there is little to prevent suspicious and resentful council members from returning to the behavior they have been working with the mediator to improve. That said, there are ways to address this and reasons to do so.

79. See MINN. STAT. § 13.05, subdiv. 3(d) (2014).

80. While there is no statutory requirement that a statutory city meet on any particular schedule, it must be at least frequently enough to allow for prompt payment of bills, which generally means that city councils meet at least monthly. See MINN. STAT. § 471.425 (2014). Many councils meet twice a month, with regular work sessions and other proceedings often adding additional meetings to the schedule.

V. IMPROVING PUBLIC ENGAGEMENT

Although promoting a well-functioning council is important, healthy public participation is at least as critical. While too much public engagement can sometimes be a problem, it is far more common to have too little. That is not typically a legal issue, though. Minnesota has any number of laws requiring local governments to provide notice of public hearings before taking action.⁸¹ The Minnesota Department of Transportation, the Metropolitan Council, the Metropolitan Airports Commission, police departments, and developers can all attest how notice of a transportation project, the relocation of a sex offender, or a proposed development can result in large crowds and long meetings.

While public hearings can be helpful for a local official trying to gauge the desires of the constituency, these often do not result in a true dialogue about the issue before the government body. More significant is that the type of public participation required by statute is often inadequate to create public engagement at a foundational level.

It is important to be clear about the meaning of “public engagement.” For present purposes, it can be thought of as a term encompassing multiple ways of bringing people together to address issues of public importance. The ultimate goal of “direct public engagement” is to establish a process that involves individuals in commenting on, communicating about, and building consensus for important decisions at the local level.⁸²

81. See, e.g., MINN. STAT. § 412.191, subdiv. 4 (2014) (requiring that statutory cities publish ordinances or summaries of the ordinances in the city’s legal newspaper); see also *id.* § 429.061, subdiv. 1 (requiring that notice of proposed special assessments be provided to the general public and affected property owners); *id.* § 462.355, subdiv. 2 (requiring a public hearing before adoption or amendment of a comprehensive plan); *id.* § 469.033, subdiv. 2 (requiring a public hearing before a city housing and redevelopment authority may be created).

82. Inconsistent and overlapping use of the term (and other related terms such as “stakeholder engagement” and “civic engagement”) results in an array of processes for engagement, inconsistent measures of effectiveness, and spotty research about which processes accomplish their goals (which also vary). Tina Nabatchi & Lisa Blomgren Amsler, *Direct Public Engagement in Local Government*, 44 AM. REV. PUB. ADMIN. 63S, 64S (2014), http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1025&context=dri_symposia.

In Minnesota and elsewhere, there is growing interest in the use of public engagement in order to increase civility and improve the democratic process, among other goals. The National League of Cities (NLC) Report, “Beyond Civility: From Public Engagement to Problem Solving,” identified cities and towns where local leaders engaged people “in constructive discussions and positive action to address community challenges.”⁸³ The NLC’s examination of what works informed the development of seven general principles for “doing democratic governance right” including “creat[ing] opportunities for informed engagement.”⁸⁴ In the same vein, the League of Minnesota Cities and Minnesota City/County Management Association (MCMA) 2011 Civility Task Force recommends that local governments “(a)dopt effective citizen engagement strategies and take time to build a broad base of support for city projects.”⁸⁵

For example, Tanya Ange, former Deputy City Manager for Mankato, Minnesota, says that Mankato recognizes the importance of safe spaces and facilitative environments which reach “all voices” in the community, including those not traditionally engaged with city government.⁸⁶ Ange also describes Mankato’s recent and ongoing engagement process to update its 2006 City Center Renaissance Plan for the Old Town area in downtown Mankato.⁸⁷ The process was initiated after a corporate concern left the area and a quarry was decommissioned, creating significant development opportunities.⁸⁸ Mankato invited community partners and stakeholder groups to provide input into the updated Old Town plan. The city made a significant effort to reach as many interested individuals and groups as possible through press releases, leaving door hangers on every business and residence in a seven-block area to publicize the kick-off meeting.⁸⁹ In addition, the city attended local businesses already scheduled meetings to solicit

83. NAT’L LEAGUE OF CITIES CTR. FOR RESEARCH & INNOV., BEYOND CIVILITY FROM PUBLIC ENGAGEMENT TO PROBLEM SOLVING 3 (2011), <http://www.nlc.org/documents/Find%20City%20Solutions/Research%20Innovation/Governance-Civic/beyond-civility-rpt-jan11.pdf>.

84. *Id.*

85. JOINT TASK FORCE REPORT ON CIVILITY, *supra* note 27, at 10.

86. Interview with Tanya Ange, Deputy City Manager for Mankato (Feb. 24, 2016).

87. *Id.*

88. *Id.*

89. *Id.*

engagement, resulting in a robust meeting with 167 participants and 60 additional online comments.⁹⁰ Mankato has plans for three additional, more focused meetings to seek input on the process.⁹¹

According to Ange, Mankato believes that significant investment of resources to “do it together” builds support and incorporates ideas as the plan develops rather than waiting for the public to react to a proposal.⁹² Keys to the success of “The Mankato Way” are: (1) the commitment to including all voices; (2) taking the time to do the pre-planning and outreach; (3) ensuring a safe space by breaking into smaller groups for in-person meetings and having other ways to participate, such as online comments; (4) providing city staff with support they need to facilitate meetings, including training; and (5) asking open questions not presuming the outcome.⁹³

The enthusiasm many city officials have for public engagement is echoed by academics and conflict resolution practitioners, who are discussing the use of dialogue to address growing polarization in public life and politics. Researchers are finding indicators of increased polarization across the country⁹⁴ and Minnesota is not immune. Researchers have mapped the ideological polarization of legislators by looking at each state’s voting records; Minnesota was determined to be the tenth most polarized state, meaning that the Democratic and Republican legislators are quite far from each other ideologically.⁹⁵

This polarization is far from the only problem. However, Tina Nabatchi and Lisa Amsler point out that the enthusiasm for deliberative engagement is often dampened by systemic barriers, pointing out that “government officials have reason to shun more innovative forms of participation in favor of compliance with minimum standards. Government lawyers raise concerns about the legal authority of their clients to move beyond the minima.”⁹⁶

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See, e.g., Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

95. J. Patrick Coolican, *Yes, Minnesota Politics Are Polarized, Partisan and Predictable*, STAR TRIB., (Jan. 30, 2016), <http://www.startribune.com/yes-minnesota-politics-are-polarized-partisan-and-predictable/367110871/>.

96. *See Direct Public Engagement in Local Government*, *supra* note 82, at 68S.

Further, sunshine laws limit the capacity of public officials to respond to public concerns outside of the agenda, prompting municipal authorities to “do the minimum required public comment approach using the standard ‘three-minutes-at-the-microphone’ tactic” rather than more deliberative approaches.⁹⁷ Taking a hard look at the value and effectiveness of public engagement practices can help public officials determine when the benefits of deliberative engagement make it worth the effort to overcome the barriers to its use.

A. *Research on Effectiveness of Public Engagement Processes*

Of course, public engagement is only important if it makes a difference. A recent review of research findings concludes there is evidence to support both critics and proponents of public engagement processes.⁹⁸ The types of public engagement processes in question include traditional time-limited public comments and education efforts that are mostly one-way communications, as well as deliberative in-person processes that bring people together to discuss public problems.

Some examples of direct public engagement include:

- 1) Traditional Public Engagement:
 - a) mailings, e-mailings, social media, news releases, websites;
 - b) public comments; and
 - c) public meetings.
- 2) Deliberative Public Engagement:
 - a) one-on-one discussions with constituents;
 - b) surveys and focus groups that collect information and solicit opinions, with summaries of results generally provided to the public;
 - c) informal small meetings;
 - d) dialogues to review information, gain better understanding of different points of view, define issues, and solve problems;
 - e) workshops where members of the public attend a meeting to review information, define issues, solve problems or plan reviews; workshops are typically facilitated and focus on educating participants and

97. *Id.*

98. *Id.* at 75S.

solving a problem or developing a product such as an action plan; and

- f) formal citizen advisory/consultation committees established to advise project leadership on specific issues in which members may be selected to represent a cross-section of the community or based on their expertise or involvement in specific issues.

The most common traditional public engagement approaches are public meetings and hearings.⁹⁹ Although evidence about traditional public engagement effectiveness is thin and mixed, these traditional approaches seem to have a “low impact . . . on individuals, communities and government and governance.”¹⁰⁰

Other research supports this conclusion. For example, in the Knight Foundation’s “Soul of the Community” study, “researchers found that attending a public meeting was more likely to reduce a person’s sense of efficacy and attachment to community than to increase it.”¹⁰¹ The National League of Cities and others also suggest that methods of engagement commonly used by local governments, such as town hall meetings, open comment periods, and open houses, all too often leave members of the public frustrated by the limited opportunities for real, two-way dialogue.¹⁰²

On the other hand, research suggests most studies on deliberative public engagement indicate that “deliberative participation can help people learn about issues, form more consistent and durable opinions, and improve their civic skills and dispositions, including political interest public spiritedness, trust in government, political efficacy, and deliberative competence.”¹⁰³ Mark Funkhouser, former Mayor of Kansas City, MO writes:

Every public official who has served for any length of time has horror stories about these forums (traditional public engagement). The usual suspects show up—the self-appointed activists (who sometimes seem to be just a little nuts) and the lobbyists. Regular folks have made the calculation that only in extreme circumstance, when they are really scared or angry, is attending a public hearing

99. *Id.* at 76S.

100. *Id.* at 79S.

101. Matt Leighninger, *Three Minutes at the Microphone in THE WORKING GRP. ON LEGAL FRAMEWORKS FOR PUB. PARTICIPATION, MAKING PUBLIC PARTICIPATION LEGAL* 4 (Oct. 2013).

102. *See Direct Public Engagement in Local Government, supra* note 82, at 76S.

103. *See id.* at 78S.

worth their time. And who can blame them when it seems clear that the game is rigged, the decisions already have been made, and they'll probably have to sit through hours of blather before they get their three minutes at the microphone?

....

In my experience, citizens are not apathetic but they are rational. Give them an opportunity for meaningful engagement with others in their community about issues that directly affect them and their neighbors instead of three minutes at the microphone, and they'll show up.¹⁰⁴

B. *The Deliberative Public Engagement Difference*

Our experience is consistent with the research that deliberative public engagement can be worth the extra effort because it builds the relationships necessary to make doable and durable public decisions, even in a polarized situation. With the rise of the internet and the ease of mass communication through a range of media that would have been unimaginable a generation ago, citizen concerns are often expressed publicly, well before or instead of conversation with public officials, and provide opportunities for people who previously might never have been engaged in the discussion.¹⁰⁵ Not surprisingly, there can be multiple perspectives and values at play in the public arena that arise very quickly over a controversial issue.

Furthermore, people may be guided by what is most important to them, informed by a deep-seated and ingrained sense of what *should* be done.¹⁰⁶ Current political climates can make it more difficult to appreciate the disparate views being expressed. For example, a PEW Research Center study found that, on a national

104. Mark Funkhouser, *The Failure and the Promise of Public Participation*, GOVERNING (Jan. 6, 2014), <http://www.governing.com/gov-institute/funkhouser/col-failure-promise-public-participation-government.html>.

105. For an in-depth discussion on internet participation, see generally Jennifer Evans-Cowley & Justin Hollander, *The New Generation of Public Participation: Internet-Based Participation Tools*, 25 PLANNING, PRACTICE & RESEARCH 397–408 (2010).

106. The statement, “this is how the world *should* be,” is usually a values statement. Those who disagree are apt to judge the other person as wrong, stupid, crazy, or worse. See Mitchell Maiese, *Moral or Value Conflicts*, BEYOND INTRACTABILITY (July 2003), <http://www.beyondintractability.org/essay/intolerable-moral-differences>.

level, polarization is broader and deeper than in the recent past. “In 1994, hardly a time of amicable partisan relations, a majority of Republicans had unfavorable impressions of the Democratic Party, but just 17% had *very* unfavorable opinions. Similarly, while most Democrats viewed the GOP unfavorably, just 16% had *very* unfavorable views. Since then, highly negative views have more than doubled: 43% of Republicans and 38% of Democrats now view the opposite party in strongly negative terms.”¹⁰⁷

Beliefs linked to different values or worldviews are often central, rigid, held with great confidence, easily accessible, produce certainty in decision-making situations, and may lead to cognitive strategies such as:¹⁰⁸

- 1) attending to information that is consistent with the conflict supporting beliefs, while ignoring inconsistent information;
- 2) construing ambiguous information in line with the conflict supporting beliefs;
- 3) actively seeking information that confirms conflict supporting beliefs ;
- 4) less critically examining information that confirms conflict supporting beliefs;
- 5) maintaining prior beliefs despite unequivocally clear and contrary evidence or in total disregard of any reasonable likelihood of success; or
- 6) forgetting or actively distorting critical information.

As the result of this polarization and mutual distrust, public discussion often results in the public, administrators, and elected officials attempting to:

- 1) “set the record straight” with a desire to win;
- 2) convince the “other side” they are wrong;
- 3) ignore the others as unimportant, self-centered, power hungry or ill informed;¹⁰⁹
- 4) solve the problem as quickly as possible;¹¹⁰ and

107. Coolican, *supra* note 95.

108. See Roy J. Eidelson & Judy I. Eidelson, *Five Beliefs That Propel Groups Toward Conflict*, 58 AM. PSYCHOLOGICAL ASSOC. 182 (Mar. 2003), <http://isites.harvard.edu/fs/docs/icb.topic920395.files/Dangerous%20Ideas.pdf>.

109. There is a natural tendency to vilify others when values and beliefs conflict.

110. Force a solution without understanding the problem or the other perspectives.

- 5) focus on communicating their perspective rather than listening to others.

In this type of setting, traditional public engagement models are in some ways the safe choice, because they allow people to speak to why they are right and ignore the others who they believe are wrong. Safe, perhaps, but dangerous. Traditional engagement choices risk escalating the levels of conflict and ultimately making public decisions more difficult. In a polarized construct, both “sides” quickly settle into an adversarial set of assumptions about the other, before having explored whether they can come to shared understanding or have joint interests. Once a person starts down an adversarial path and becomes “positional,” it is very difficult for the people involved to move away from hardened positions.

Taking positional postures is often counterproductive, as it involves fixing onto a desired idea or outcome and brooking no opposition, regardless of any underlying interests. In doing so, the positions of other people are devalued and relationships damaged.¹¹¹

When this dynamic is in place, it is difficult to persuade a person to consider opposing perspectives. It is instead far more effective to frame a position in terms of the moral values of the person who one is trying to convince. A recent study by Robb Willer and Matthew Feinberg concluded “when it comes to politics, this turns out to be hard to do. We found that people struggled to set aside their reasons for taking a political position and failed to consider how someone with different values might come to support that same position.”¹¹² They suggest that “maybe reframing political arguments in terms of your audience’s morality should be viewed less as an exercise in targeted, strategic persuasion, and more as an exercise in real, substantive perspective taking. To do it, you have to get into the heads of the people you’d like to persuade.”¹¹³

111. Positional attitudes have a time and a place. They work best when there is no need for cooperation from others, haggling, compromising between conflicting interests is occurring, or in crisis situations.

112. Robb Willer & Matthew Feinberg, Opinion, *The Key to Political Persuasion*, N.Y. TIMES (Nov. 13, 2015), http://www.nytimes.com/2015/11/15/opinion/sunday/the-key-to-political-persuasion.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0. In fact, one of the strongest moves a negotiator can make is to restate an opponent’s position before explaining the basis for the disagreement.

113. *Id.*

This is a crucial point—a situation cannot be properly assessed unless it is objectively assessed. Objectivity helps one avoid making assumptions and having positional reactions. It also helps one imagine others' interests.

For example, imagine an interest group creates a website with pictures of acres of paved parking lots, complete with cracks and weeds. The website states the city wants to put that in the middle of a prized park. In fact, the city is considering a proposal from the Park Department to add fifty-feet of paved trail from the street to the playground in order to meet accessibility standards.

One way to perceive the interest group is as a fear-mongering NIMBYs intent on blocking the city because of unrealistic anti-development beliefs. Another possibility is that they are concerned community members who may misunderstand the nature of the project and want their concerns to be understood and validated. Without further inquiry, it is impossible to know the “truth” of the community members objecting to the proposal.

Similarly, confirmation bias is the tendency to interpret actions and attribute motivations to support a preexisting interpretation. A person will respond differently to people in the stakeholder group based on which “story” above he or she imagines to be true. People tend to live up or down to the expectations set for them, so beliefs may fuel their bad behavior. The point is to avoid making conclusions without facts.

What Willer and Feinberg call “getting into the heads of the people you’d like to persuade,” Nicholas Epley calls “perspective getting.”¹¹⁴ He points out that a person who talks with like-minded people about their opponents often has an increased bias against those with opposing views.¹¹⁵ “If your belief about the other side’s perspective is mistaken, then carefully considering that person’s perspective will only magnify the mistake’s consequences.”¹¹⁶ In other words, the only way to understand someone else’s perspective is to get it instead of taking it, and the way to do that is by talking with them.¹¹⁷

An additional risk to the approach of debating positions is that the battle may be won and the war lost. In other words, while a

114. NICHOLAS EPLEY, *MINDWISE: HOW WE UNDERSTAND WHAT OTHERS THINK, BELIEVE, FEEL, AND WANT* 161 (Random House, LLC ed., 1st ed. 2013).

115. *Id.*

116. *Id.*

117. *Id.*

person might prevail in the immediate argument, he or she will suffer long-term damage to his or her reputation and ability to cooperate with other community members. Furthermore, there may be an increase in political pressures and stiff opposition to policy decisions. A person believing that he or she has lost is far more likely to redouble efforts than to thank the people on the other side for a good debate.¹¹⁸

C. *Developing Dialogue*

The answer is not for a person to ignore his or her own perspectives and interests.¹¹⁹ Rather, it is to seek an expanded view of what interests are important, considering longer term interests and the interests of others. The key to focusing on interests rather than positions is to engage in dialogue.¹²⁰

The types of interests that could be at play in a specific situation, beyond the ultimate outcome, constitute a broad range and could include:

- 1) procedural fairness;¹²¹
- 2) effective communication—understanding and being understood;¹²²

118. The other big risk is that when an impasse is hit, neither side is willing to budge, and control of the decision passes to an outside decision maker such as an administrative body or court.

119. Interests are defined as “needs, desires, concerns, and fears.” ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 43 (Bruce Patton ed., 3rd ed. 2011). An honest exploration of interests, will often find both shared and conflicting ones. “Focusing on the shared ones is the key for synergistic solutions that can lead to wise win-win agreements. A wise agreement is one . . . which meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account.” *Id.* at 4.

120. A quick distinction between debate and dialogue. Debate (one way) focuses on communicating a message to others. Dialogue (two ways) focuses on listening and communicating.

121. The concept of “fairness” is steeped in environmental regulations. Definitions of fairness differ, and the point is to jointly discuss how to operationalize “fair” or risk the vehemence with which people complain when they believe they have not been treated fairly. According to procedural justice theory, the three most important factors impacting whether a stakeholder perceives a process to be “fair” are: (1) Having a meaningful opportunity to tell their story; (2) Receiving assurance the responder has listened to his or her story and cared about what was said; and, (3) Treating all participants with dignity and respect.

122. For example, people *want* to know as early as possible about sensitive sites

- 3) transparency to reduce mistrust;
- 4) building support and relationships (even if there is disagreement);
- 5) demonstrating commitment to impacted communities; and
- 6) nurturing a reputation in the community for long term effectiveness.

Ultimately, deliberative public engagement processes vary widely, but they all focus on the elements of procedural justice—opportunities to be heard and acknowledged, and to listen to others in a respectful environment.¹²³ Hallmarks of successful deliberative processes include the following:¹²⁴

- 1) assessment and planning phases;
- 2) opportunities to build relationships, discuss issues, and celebrate community;
- 3) opportunities for stakeholders to develop knowledge in order to make informed choices or give feedback;
- 4) clarity and transparency in decision-making process;
- 5) effective conflict management;
- 6) enhanced communications between decision-makers and public;
- 7) improved decisions based on shared understanding;
- 8) people of all backgrounds and viewpoints are actively invited and feel welcomed to participate;
- 9) people on opposing sides of public issues interact, in respectful and productive ways, despite their differences;
- 10) participation has a tangible and readily apparent impact on policy decisions, public plans, and public budgets;
- 11) public servants, other organizations, and citizens themselves are taking action (often in collaborative or coordinated ways) to address key issues and opportunities;
- 12) effective use of citizen commissions and project task forces as a way to identify and address community needs; and

in the local community when planning a redevelopment project.

123. This differs from faux participation where the goal is for members of the public to *feel* heard without any intent to *actually listen* to them.

124. See JOINT TASK FORCE REPORT ON CIVILITY, *supra* note 27.

13) conversations about challenges and problems before jumping to proposed solutions.

Importantly, though, effective public engagement processes cannot be achieved by simply adopting a successful model from another context. The key is to assess each situation and tailor an approach (or several approaches) for the context. Methods that include significant opportunity for engagement are particularly useful in the following: when building integrated solutions; for complex project issues; for engaging specific sub-groups within a community; in situations where there is controversy or complexity around issues; and, to build consensus around possible solutions. Note, though, that it can be harmful to half-heartedly or conditionally take on a significant deliberative public engagement initiative. Thus, before beginning to assess or plan for a deliberative engagement process, be sure to confirm the following statements:¹²⁵

ADMINISTRATIVE

- Elected officials and staff have a shared understanding of the purpose of the engagement and what is being discussed.
- Engagement is not a substitute for making difficult decisions.
- There is high-level support for the method of engagement.
- There are the ability and resources necessary to implement the engagement.
- It is clear what information is being sought and how the officials and the community will use it.
- It is understood who needs to be engaged on the topic.

PUBLIC NEEDS

- An effort is being made to ensure that a decision meets the public's interests.
- Participants understand why they are being consulted and how their answers will be used.
- There is a process to explain to the community what has been learned.
- The purpose is to gain an understanding from all perspectives, resulting in appropriate changes.

125. Edward Anderson & Thea Shahrokh, *Not Another Consultation! Making Community Engagement Informal and Fun*, LOCAL GOV'T IMPROVEMENT AND DEV. 12 (Nov. 2010), <http://www.involve.org.uk/wp-content/uploads/2011/09/Not-Another-Consultation.pdf>.

- All members of the community have access to relevant information necessary for participation.

A deliberative public engagement process may be a good idea if an assessment reveals the “all affected stakeholders are willing to collaborate; the collaborating parties have decision-making authority; sufficient time and resources are available to support the effort; and the issue is ripe for discussions with all parties willing to negotiate on the key issues”.¹²⁶ Assessment findings indicating deliberative public engagement include:

- 1) there are overlapping interests (compromise/negotiation is possible);
- 2) desired outcomes are doable;
- 3) leadership supports it;
- 4) there is political and administrative support and the approach will comply with regulatory requirements;
- 5) the public is likely to participate, and there is a plan to reach out to all who might be impacted by a decision;
- 6) the issue is ripe, with at least preliminary information available to the public, and a current need to address the issues;
- 7) the issues are complex and/or controversy is high, and potential benefits from the investment of resources are identified;
- 8) resources are available; and
- 9) identified employees/consultants have the skills and capacity to engage with the public

VI. CONCLUSION

In order for local government to matter, its officials must have the ability to draw the public into the process and the skills to make the most of that participation. That requires laws that incorporate our understanding of human behavior, that promote both debate and conflict resolution, and that strive for a balance between the right to know and the right to efficient delivery of public services. Local government is the question of when the snow-plow comes through and when the fire department arrives, of what kind of community we want for ourselves and our children. The ability of

126. U.S. Institute for Environmental Conflict Resolution FAQs, UDALL FOUND., <https://www.udall.gov/OurPrograms/Institute/QuestionsAnswers.aspx#> (click on “When is ECR Appropriate”) (last visited Aug. 11, 2016).

our representatives to have that conversation amongst themselves, and with us, is a fundamental part of “the hard, often frustrating, but absolutely necessary work of self-government.”¹²⁷

127. Barack Obama, President of the United States, Remarks by the President in the State of the Union Address, THE WHITE HOUSE (Feb. 12, 2013), <https://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

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