District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100	EFILED Document CO Larimer County District Court 8th JD Filing Date: Jun 10 2011 12:12PM MDT Filing ID: 38080764 Review Clerk: Stephen Craig Adams DATE FILED: June 10, 2011 12:12 PM
THE CITY OF LOVELAND, COLORADO, a home rule municipality; and **WILLIAM T. CAHILL,** City of Loveland City Manager Petitioners, v. **PRAIRIE MOUNTAIN PUBLISHING COMPANY LLP**, d/b/a **THE LOVELAND DAILY REPORTER-HERALD** Respondent and Counterclaim Plaintiff, and, **KEN AMUNDSON,** Counterclaim Plaintiff, v. **THE CITY OF LOVELAND, COLORADO**, a home rule municipality Counterclaim Defendant.	**▲ COURT USE ONLY ▲** Case Number: **10CV925** Courtroom: 5A
ORDER REGARDING JUDGMENT ON THE PLEADINGS	

I. INTRODUCTION

This matter comes before the Court on the Petitioner's "Motion for Judgment on the Pleadings, or alternatively, Motion for Summary Judgment" filed by the City of Loveland, Colorado and, William Cahill, Loveland City Manager ("City") and the Respondent's "Cross

Motion for Judgment on the Pleadings and Opposition to Petitioners' Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment" filed by Prairie Mountain Publishing Company LLP, and Ken Amundson (collectively "Prairie Mountain").[1] The Court has considered the pleadings, the parties' response and reply briefs filed with respect to the cross-motions, along with all the exhibits attached to those documents, and the arguments offered at oral argument.

II. FACTUAL BACKGROUND

The Court finds that the following facts are not disputed:

The City, a home rule municipality, established its Municipal Charter ("Charter") pursuant to Article XX, § 6 to the Colorado Constitution. Under the Charter, the Loveland City Council ("Council") is a body made up of eight members and a mayor. Prairie Mountain publishes a daily newspaper in Loveland, Colorado called the *Loveland Daily Reporter-Herald*.

In March, 2010, the City began searching for a new city manager. On August 3, 2010, the City announced the names of three finalists it would consider for the position. It also made public all records submitted by or on behalf of the finalists with certain exceptions. None of the finalists were employees of the City.

On August 20, 2010, at a special open session, the Council elected to convene an executive session for the purpose of conducting a panel-activity interview with the three finalists, to discuss the activity outside the presence of those applicants, to finalize interview questions, to

---

[1] Prairie Mountain substituted for Lehman Communications Corporation as the Respondent and as a counterclaim plaintiff in this action after it acquired the Loveland Reporter-Herald. In the interests of simplicity, the Court will refer to Prairie Mountain throughout, although some of the actions referred to were taken by Lehman Communications prior to the substitution.

conduct three successive individual interviews with the finalists, and to receive legal advice from the City's attorney on these matters.

On August 24, 2010, in a regular open session, the Council elected again to convene an executive session. This session's purpose was to receive information from the City's management team regarding their interview of the three finalists, to discuss each of the finalists and matters related to the hiring decision, and to receive legal advice about the decision.

On August 26, 2010, at a special open session, the Council elected to convene a third executive session. The session's purpose was to discuss the hiring of the new city manager and the appointment of an interim city manager, to instruct negotiators, and to receive legal advice regarding these matters.

On August 27, 2010, the City, through its director of human resources, issued a press release stating one of the three finalists had been eliminated from consideration, and that the Council would consider at its regular meeting on September 7 the appointment of the Assistant City Manager as the Acting City Manager until the newly appointed City Manager started. On September 2, 2010, Prairie Mountain, through its attorney, sent the City a letter requesting that it release the audio recordings of its three August executive sessions, citing the Colorado Open Meetings Law ("COML") and the Colorado Open Records Act ("CORA") as authority.

On September 7, 2010, during its regular open session, the Council adopted a resolution appointing the assistant city manager as the acting City Manager and a motion to finalize negotiations and a contract with one of the finalists for the job as permanent City Manager. At this session, the Council also elected to convene a fourth executive session with the stated purpose of receiving legal advice regarding Prairie Mountain's request in its September 2 letter, determining negotiating positions, developing negotiating strategies regarding the two remaining

finalists, and instructing the City's negotiators concerning Prairie Mountain's request for the August recordings.

On September 8, 2010, the City and the custodian of records, through the City Attorney, filed a "Petition for Declaratory Relief" with this Court, which is the subject of this action. In this Petition, the City requested "a determination and declaration of the City's and the Official Custodian's rights, duties and obligations under the [C]OML, CORA, and the [] Charter related to the request for public disclosure" of the recordings of the executive sessions.

On September 14, 2010, at a special meeting, the Council adopted a resolution appointing William D. Cahill as the City Manager, effective November 1, 2010, and approving an employment agreement with him. On that same date, Prairie Mountain sent the City a letter stating that the Council's fourth executive session was also in violation of the COML because it was convened, in part, to authorize the city attorney to file the petition for judicial review.

The executive sessions on August 20, August 24, and August 26 executive sessions were all digitally recorded. Only brief portions at the beginning and the end of the September 7 executive session were digitally recorded on the grounds that the balance of the session constituted attorney-client communication.

On October 13, 2010, Prairie Mountain filed its "Response and Counterclaims." In its First Counterclaim, Prairie Mountain requests that the Court conduct an *in camera* review of the recordings of the executive sessions to determine whether the Council violated the COML and, if it finds such a violation, to order that the appropriate portions of the recordings be open for public inspection. In its other three counterclaims, Prairie Mountain requests the Court declare the following: (1) that "the hiring of the City Manager, under the facts as averred herein, is not a matter of purely local concern"; (2) that the Council "cannot, lawfully, convene an executive

session meeting to discuss candidates for public employment under the 'personnel matters' exemption of the [COML]"; and (3) that the Council "is prohibited under the COML from making any 'informal' decisions, by vote, consensus, or other means, in the course of an executive session." The City filed its Reply to the Counterclaims on November 2, 2010. The Counterclaims were amended, with Court leave, on November 29, 2010, and the City filed its Reply to the Amended Counterclaims on December 16, 2011, closing pleadings in the case.

Following a case management conference, the Court established a schedule to allow the parties to file and brief cross-motions, with the City and Prairie Mountain both having an opportunity to file an opening brief in support of its motion, a response to the other party's motion, and a reply in support of its own motion. This briefing was completed on April 7, 2011, and the Court held oral argument on the motions on May 13, 2011.

III. LEGAL STANDARD FOR MOTION FOR JUDGMENT ON THE PLEADINGS

In considering a motion for judgment on the pleadings, the trial court must construe the allegations of the pleadings strictly against the movant, must consider the allegations of the opposing party's pleadings as true, and should not grant the motion unless the pleadings themselves show that the matter can be determined on the pleadings. *Platt v. Aspenwood Condo. Ass'n, Inc.*, 214 P.3d 1060, 1066 (Colo. App. 2009). Entry of judgment on the pleadings is proper only if the material facts are undisputed and the movant is entitled to judgment as a matter of law. *Quiroz v. Goff*, 46 P.3d 486, 488 (Colo. App. 2002).

C.R.C.P. Rule 12(c) states that if matters outside the pleadings are presented on a motion for judgment on the pleadings "and not excluded by the court," the motion "shall be treated as one for summary judgment pursuant to Rule 56." A document that is referred to in the pleading, however, even though not formally incorporated by reference or attached to the pleading, is not

considered a "matter outside the pleading," and may be considered on a motion to dismiss without converting the motion to one for summary judgment. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (citing *Yadon v. Lowry,*126 P.3d 332, 336 (Colo. App. 2005)). Here, the Court finds the pleadings and those documents referenced therein to be sufficient to enter judgment on the pleadings. Accordingly, the Court does not apply the summary judgment standard pursuant to C.R.C.P. Rule 56.

IV. ANALYSIS OF REQUESTS FOR DECLARATORY RELIEF

A. Legal Standard for Declaratory Relief

Under C.R.C.P. 57 and C.R.S. §§ 13-51-101 to 115, the Court has the power to declare rights, status, and other legal relations "affected by a statute" whether or not further relief is or could be claimed, as long as the proceeding is based upon an "existing legal controversy that can be effectively resolved by a declaratory judgment, and not a mere possibility of a future legal dispute over some issue." *Bd. of County Comm'rs, La Plata County v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992). To the extent that a declaratory relief action involves the determination of issues of fact, the parties may demand a jury trial just as they could in other civil actions. C.R.S. § 13-51-113; C.R.C.P. 57(m).

B. Executive Sessions with Respect to Selection and Appointment of the City Manager

The primary issue in this case is whether the City properly convened executive sessions to consider non-employee applicants for the position of City Manager. These executive sessions occurred during the three executive sessions that occurred in August, 2010. The City maintains that the question is controlled by its Charter, that the Charter allows it to convene such executive sessions, and, alternatively, that the COML also allows such sessions. Prairie Mountain

contends that the question is controlled by the COML, that the COML forbids such executive sessions, and, alternatively, that such sessions are prohibited under the Charter as well.

In resolving this dispute, the Court will first consider the general legal principles applicable to a question involving a potential conflict between a state law and a local law or action, and consider the analytical structure appropriate to this case. Because the Court concludes that the COML does not abrogate a power granted solely to the City by the constitution, it then engages in a multi-factor inquiry as mandated by the controlling case law, and determines that the "matter" at issue is one of mixed state and local concern. It then interprets the applicable provisions of the COML and the Charter to determine what they allow and whether they conflict.

1. General Legal Principles

The City is a home-rule municipality pursuant to Article XX of the Colorado Constitution. Section 6 of Article XX ("Section 6"), sometimes referred to as the "Home Rule Amendment," was adopted by Colorado voters in 1912 and grants "home rule" powers to municipalities operating under its provisions. *City & County of Denver v. State,* 788 P.2d 764, 766 (Colo. 1990). This constitutional shift of authority altered the basic relationship between home rule municipalities and the General Assembly by providing home rule municipalities the same power to regulate local affairs as that possessed by legislature with respect to statewide matters. *Fraternal Order of Police v. City & County of Denver,* 926 P.2d 582, 587 (Colo.1996).

As relevant in this case, Section 6 provides that:

> [S]uch a city or town . . . shall have the powers set out [in this article], and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including the power to legislate upon, provide, regulate, conduct and control:

> a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees[.]

In determining whether the municipal charter supersedes state legislation, the Colorado Supreme Court has recognized three broad categories of regulatory matters: matters of statewide concern, matters of local concern, and matters of mixed state and local concern. For matters of statewide concern, the state legislature has total authority and municipalities have no power to act unless authorized by state statute or the constitution. *Town of Telluride v. Lot Thirty-Four Venture, LLC,* 3 P.3d 30, 37 (Colo. 2000) ("*Telluride I*"). If the matter is one of purely local concern, both home-rule municipalities and the state may legislate, but if the home-rule ordinance conflicts with a state statute regulating the same, the home-rule provision supersedes the conflicting state provision. *Id*; *see also, e.g. Town of Telluride v. San Miguel Valley Corp.,* 185 P.3d 161, 171 (Colo. 2008) ("*Telluride II*"); *Denver v. State*, 788 P.2d at 767 (finding a state statute unconstitutional because it conflicted with a local initiative on a matter of local concern). If the matter is one of mixed state and local concern, the two provisions may coexist to the degree that they do not conflict, but if they do conflict, the state statute supersedes the home-rule authority. *Telluride I*, 3 P.3d at 37. "The test to determine whether a conflict exists is whether the home-rule city's ordinance scheme authorizes what the state legislation forbids, or forbids what the state legislation authorizes." *City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002).

The Colorado Supreme Court has stated that "there is no litmus-like indicator for resolving whether a matter is of local, statewide, or mixed concern." *Telluride I*, 3 P.3d at 37 (citing *Nat'l Adver. Co. v. Dept. of Highways*, 751 P.2d 632, 635 (Colo. 1988)). Because

interests often merge or overlap, courts have not developed a specific test and must determine the category in which a particular matter belongs on a case-by-case basis. *City of Commerce*, 40 P.3d at 1280. In making this determination, a court must look at the "totality of the circumstances," examining both facts and policy. *City of Northglenn v. Ibarra*, 62 P.3d 151, 155-56 (Colo. 2003); *City and County of Denver v. Qwest Corp.,* 18 P.3d 748, 755 (Colo. . 2001).

However, the Colorado Supreme Court has also declined to engage in such an inquiry in cases where it found that the issue at hand was a "conflict between a statute and the state constitution." *Telluride II*, 185 P.3d at 169. In *Telluride II*, the Court held that "no analysis of competing state and local interests is necessary where a statute purports to take away home rule powers granted by the constitution." *Id.*; *see also Gosliner v. Denver Election Comm'n*, 552 P.2d 1010, 1012 (Colo. 1976) ("The legislature may not with one broad stroke nullify a constitutionally-created power."); *Town of Frisco v. Baum*, 90 P.3d 845, 849-50 (Colo. 2004) (holding that Section 6 grants home rule city power to determine municipal court jurisdiction regarding matters of local and municipal concern, even where such a determination may effect the jurisdiction of the district court).

In cases that, unlike *Telluride II*, do not involve a direct conflict between a state statute and the state constitution, the court generally weighs four factors in making its assessment: (1) the need for statewide uniformity; (2) the impact of municipal regulations on persons living outside the municipal limits (*i.e.,* extraterritorial impact); (3) historical considerations; and (4) whether the Colorado Constitution specifically commits the matter to state or local regulations. *Ibarra*, 62 P.3d at 156; *Denver v. State*, 788 P.2d at 768-71. In addition, the Colorado Supreme

Court has stated that the General Assembly's declaration that an issue is a matter of statewide concern, while relevant to a court's inquiry is not determinative. *Telluride I*, 3 P.3d at 37.

2. The Need for Multi-Factor Inquiry under Denver v. State

The City first argues that the Court need not engage in a multi-factor, case-specific inquiry in this case because, like *Telluride II* and other cases, it is a case where "a statute purports to take away home rule powers granted by the constitution." 185 P.3d at 169. Specifically, the City claims that Section 6(a) gives it the power "to conduct and control its selection of municipal officers and employees," a power that necessarily or implicitly includes the power of the Council to determine for itself when it may convene an executive session.

Prairie Mountain responds that there is no conflict between the COML and Section 6 because Section 6 concerns only the "powers to establish and regulate the contours of municipal offices," or "the substantive parameters" of such offices, while the COML addresses only "how meetings of public bodies are to be conducted." At most, according to Prairie Mountain, the COML constitutes a permissible "regulation" of the City's exercise of its powers, not the type of "abrogation" at issue in *Telluride II.*

As is frequently the case in disputes with a constitutional dimension, the framing of an issue plays a fundamental role in its resolution. Therefore, this "framing" should be addressed explicitly, at the beginning of the analysis. In the Court's view, Prairie Mountain's approach to the "matter," i.e., the issue that may be of statewide concern, local concern, or mixed statewide and local concern, properly focuses the analysis on the real concerns in this case. Following this approach, the Court frames the matter at issue as follows: the conduct of Council meetings related to the appointment of a City Manager by the Council.

The Court disagrees with the City's position that the "matter" at issue is "the process a home rule city follows to hire its city manager." "Memorandum Brief in Support of Petitioner's Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment" ("City's Op. Br.") at p. 16; *see also id.* at p. 23 (describing matter at issue as "processes and procedures for hiring a City Manager"). Nor is the "matter" the City's power to select a particular individual as its manager or establish the qualifications or tenure of that office, *id.* at 21-22, or its "interest in hiring qualified individuals," *id.* at 25. These characterizations of the matter at issue paint with too broad a brush, thus distorting and needlessly expanding the analysis of the relationship between the COML—which has at most a limited effect on the "process" of selecting a City Manager—and the power granted to home rule cities under Section 6(a).

In some respects, *Gosliner v. Denver Election Comm'n*, 552 P.2d 1010 (Colo. 1976), is the case most closely on point with this case. In that case, the Colorado Supreme Court, without engaging in any multi-factor analysis, held that a home rule municipality's plenary power over municipal elections superseded any restrictions on executive sessions in the version of the COML then in effect, so as to allow the Denver Election Commission to hold an executive session to examine the validity of signatures on recall petitions. *Id.* The section relied on in *Gosliner*, however, article XX, section 6(d), grants power to home rule municipalities over "[a]ll matters pertaining to municipal elections in such city or town." This blanket authority over elections contrasts with the more precisely defined power granted under Section 6(a) and distinguishes *Gosliner* from this case.

Similarly, in *Baum* the Court considered a home rule municipality's power with respect to the creation and definition of jurisdiction of a municipal court. 90 P.3d at 845-46. The *Baum* court concluded that this power, with respect to matters of local and municipal concern, controls

over any conflict with the jurisdiction of the district court because of the constitution's "specific grant of authority to define the jurisdiction of their courts" in art. XX, section 6(c). Again, the specific grant of power over the precise matter at issue stands in contrast to the relationship between the matter at issue in this case and the power under Section 6(a).

The City also argues that the power to determine the conduct of public meetings regarding appointment of City officials by the Council is, if not expressly granted by Section 6(a), at least implicit in the powers granted by that provision. In making this argument, the City relies on the discussion in *Telluride II* rejecting the argument that there were "two separate echelons of condemnation powers under article XX—those express and those implied." 185 P.3d at 170. *Telluride II*, however, does not support the City's position. The *Telluride II* court rejected the argument regarding "two echelons" of power because it concluded that the power to condemn property outside city boundaries for parks, recreation, open space or similar purposes power is not merely "implied" by the express grant of art. XX, section 1. Rather, it held, following a long line of precedent, that this power, involving one of the "lawful, public, local, and municipal purpose[s]" for which a home rule municipality may use its condemnation power, is part of the express power granted by art. XX, section 1. *Id.* In this case, however, the Court knows of no authority for the proposition that the power regarding municipal officials, agents and employees expressly includes the power to determine the conduct of related public meetings.

In sum, the Court agrees with Prairie Mountain that the conflict between the City's powers under Section 6(a) and the COML is not the type of clear conflict addressed in the cases relied on by the City, i.e., *Telluride II*, *Baum*, and *Gosliner*. In contrast to those cases, the COML's provisions regarding the conduct of public meetings do not directly prevent the City from exercising its constitutional power regarding the "creation and terms of municipal officers,

agencies, and employments" or to define, regulate and alter "the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees" Even assuming, as Prairie Mountain apparently concedes, that Section 6(a) includes the power to establish the "process of identifying and selecting an individual to fill" the position of city manager, the Court concludes that the COML provisions regarding public meetings amounts at most to the type of regulation of that process contemplated by the Colorado Supreme Court in *Telluride II*. 185 P.3d at 170 n. 8 (stating that "[o]ur past cases indicate that, although the legislature may not *prohibit* the exercise of article XX powers, it may *regulate* the exercise of those powers in areas of statewide or mixed state and local concern," citing as examples *Commerce City* and *Denver v. Bd. of County Comm'rs,* 782 P.2d 753, 762 (Colo. 1989)).

Accordingly, the Court concludes that it must conduct the multi-factor inquiry under *Denver v. State* and similar cases. However, as discussed further below, in conducting this inquiry it must still consider the contours of the grant of power in Section 6(a) in determining whether the matter at issue is one of statewide, local or mixed concern.

3. The Multi-Factor Inquiry

Uniformity. Under the first factor, the court must analyze whether the State has a pervading interest in uniform regulations statewide in the matter at issue, that is, the conduct of meetings related to the appointment of a officials by home-rule cities and towns. *Telluride I*, 3 P.3d at 37. Although the Court has stated that uniformity in itself is no virtue, *Denver v. State*, 788 P.2d at 769, statewide uniformity may be "necessary when it achieves and maintains specific state goals," *Ibarra*, 62 P.3d at 160. In applying this fact, the Court has also looked at the need for cooperation between the municipality and the State, *e.g., Commerce City,* 40 P.3d at 1281, the impact of changing conditions, such as advances in technology, *id.* at 1280-81 (citing cases),

and the expectations of consistency of state residents, e.g., *id.* at 1281; *see also Telluride I*, 3 P.3d at 38.

Analysis of this factor is difficult for the Court in this case because it requires it "to make or to weigh policy" regarding actions that, unlike those in other cases, do not have a concrete or easily identifiable impact. On one hand, like Prairie Mountain, one might consider uniform open meeting laws to be a foundation of modern democracy, assuring that all citizens, as well as the media, can rely on consistent principles in exercising their right to monitor and participate in local government. *See* C.R.S. § 24-6-201 ("In order to continue the public confidence in the integrity of government officials and to promote trust of the people in the objectivity of their public servants, this open disclosure law is adopted."); *see also* Note*, Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 Harv. L. Rev. 1199, 1201-02 (1962) (setting forth argument that open meetings are "essential to the democratic process"). On the other, like the City, one may consider open meeting laws as a relatively minor part of the process by which a municipality selects its officials that has little effect on the rights or expectations of citizens that is best left in the hands of local public bodies in the interests of efficiency, good decision-making, and candid discussion by elected officials. *See id.* at 1201 (summarizing arguments regarding drawbacks of sunshine laws). An attempt by the Court to make findings with respect to this factor, accordingly, presents a significant risk that it will either impose its own policy beliefs regarding what constitutes an "important state goal"—the very "intrinsically legislative" decision it must avoid, *Telluride I*, 3 P.3d at 38, or engage in raw speculation.

The Court notes, however, that under the City's approach, the COML governs meetings in some cases—presumably when the Council and other City bodies consider issues outside of their home-rule powers—but not in others, such as the appointment of City officials. Under that

approach, citizens and the media—as well as the local public bodies themselves—can never be sure which legal standard applies in any given situation. This ambiguity at the least creates the potential for disputes and litigation, such as this case, and might result in significant frustration for citizens. It is indisputable that it is a legitimate state goal to assure that citizens can determine as easily as possible what law applies to any given issue. The importance of this goal is implicitly acknowledged by the City itself in the "Prefatory Synopsis" to the Charter, which "recognizes that certain State statutes continue to apply to the City" and that "[v]ariations were made from such statutes only where home rule powers permitted and sound reasons existed." This synopsis also acknowledges that the Charter provisions regarding executive session "generally follow State statutes." Prairie Mountain's position advances this goal, thus furthering expectations of consistency, while the City's does not. To this extent, the Court finds that this factor weighs in favor of finding Prairie Mountain's position.

Extraterritorial Impact. Under the second factor, courts look at whether a local ordinance will have a "ripple effect" on state residents outside the municipality. *Telluride I*, 3 P.3d at 38: *Ibarra*, 62 P.3d at 161. "To find a ripple effect, however, the extraterritorial impact must have serious consequences to residents outside the municipality, and be more than incidental or *de minimus*." *Id.* For the reasons noted above, the Court finds that, unlike in other cases involving economic regulation or action, it is not proper for it to consider this factor in this case. Unlike in other cases, such as *Telluride I*, that involved economic regulation or action, the question of whether there is a "ripple effect" in this case is one of policy that can not be measured or assessed in any concrete or objective manner available to the Court.

The Court declines the parties' invitation to broaden the inquiry under this factor to consider the impact a City Manager might have on surrounding communities. It is indisputable

that the decisions made by the manager of a municipality, which could involve annexation, land use, economic development, and other regional issues, can have substantial impact on those outside the municipality's borders. This impact is potentially much greater than that of the Denver deputy sheriffs considered in *Fraternal Order of Police*. 926 P.2d 582. However, the City Manager's impact is not what is at issue in this case. As stated above, the Court's focus here is on the narrower issue of the conduct of Council meetings related to the appointment of city officials by the Council.

History. Under the third factor, Courts consider whether a particular matter is one traditionally regulated by the state or a local government. *Ibarra,* 62 P.3d at 162. Although the Court assumes that prior to the COML and similar "sunshine" laws, municipalities decided for themselves when their local public bodies would meet in executive session or in open session. The City, however, has provided no authority to show that it or other cities have traditionally "regulated" this decision through charter provisions or local law in any systematic way. The City's own Charter, adopted in 1996, expressly acknowledges that its provisions regarding the "matters for which an executive session may be held" and "the procedure for going into an executive session [both] generally follow the State statutes."

On the other hand, Prairie Mountain has failed to provide any basis for finding that the issue has traditionally been regulated by the state. The Court notes, however, that "[t]here is no common-law right to attend meetings of government bodies." 2 Am. Jur. 2d *Administrative Law* § 84 (2011). The COML, part of the "Colorado Sunshine Act of 1972," was adopted by the General Assembly in 1972, following an 18-year wave of such state legislation that began in Alabama in 1958. Brian J. Caveney, Note, *More Sunshine in the Mountain State: The 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital*

Proceedings Act, 102 W. Va. L. Rev. 131, 133 (1999) (summarizing history of "sunshine laws"). Initiated by media organizations who were "disgruntled with their exclusion from the substantive debate of many governmental bodies," this legislative movement resulted in open-meeting laws in all 50 states and at the federal level. *Id.* It appears, therefore, that the systematic regulation of this issue began at the state rather than at the local level. Therefore, this factor weighs slightly in favor of Prairie Mountain's position.

Constitutional. Under the fourth factor, courts look at whether the constitution commits the matter to either state or local regulations. *Ibarra*, 62 P.3d at 162. In this case, as the Court has already determined, the constitution does not specifically provide that the conduct of public meetings related to the appointment of city officials, or the conduct of public meetings by local governments in general, shall be regulated exclusively by municipalities. Therefore, the constitution does not "necessarily disallow all state legislation in the area of concern." *Commerce City*, 40 P.3d at 1284. However, the City's home rule power under Section 6(a) regarding City offices, agencies and employments certainly recognizes a strong local interest in the process of selecting officials, and therefore weighs in favor of considering the matter of public meetings for this purpose one of mixed concern, rather than solely of statewide concern.

Legislative Declaration. As an additional factor, courts also consider "whether the General Assembly declared that the matter is one of statewide or local concern." *Telluride I,* 3 P.3d at 37. "Although such a declaration is not conclusive [citation omitted], it will be afforded deference in recognition of the legislature's authority to declare the public policy of the state in matters of statewide concern [citation omitted]." *Id.*

In its amendment of the COML in 1991, the General Assembly declared as follows: "It is declared to be a matter of statewide concern and the policy of this state that the formation of

public policy is public business and may not be conducted in secret." C.R.S. § 24-6-401. As demonstrated by the plain language of this provision, supported by the legislative history provided by Prairie Mountain, and conceded by the City, the legislature included this declaration with the intent of overriding any home rule powers of municipalities with respect to open meetings. In addition, the General Assembly in 1991 also manifested this intent by amending the definition of "local public bodies" to include (through the definition of "political subdivision of the state") "home rule cities and counties." C.R.S. § 246-402(a), (c).

Although the declaration of statewide concern provides some support for Prairie Mountain's position, it falls short of the legislative declaration considered in *Telluride I*, which provided that "the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit." C.R.S. § 38-12-301 (cited in *Telluride I*, 3 P.3d at 38). In particular, the legislative declaration in the COML does not expressly preempt local laws governing the issue, and arguably supports local laws that advance beyond the requirements of the COML the interest in preventing the formation of public policy "in secret."

As in other cases, however, the declaration is "instructive," confirming Prairie Mountain's position that the conduct of public meetings by local public bodies, even for activities involving specifically granted home rule powers, is not a matter of purely local concern. *Id.* at 38. As discussed above, the importance of public meetings is ultimately a policy determination, involving consequences that are difficult if not impossible to measure and value and thus best left to legislative determination. Therefore, the Court finds that this declaration supports a finding that the matter is one of mixed concern.

Conclusion. In light of the above factors, the Court concludes that the matter, i.e., the conduct of public meetings related to the appointment of city officials by the Council, is a matter of mixed state and local concern. Both the City and the state have legitimate interests in this matter, but the City's interests are not so intrinsic to its home rule powers for this matter to be purely local, nor are the state's interests so pervasive as to completely preempt any City power to regulate. Moreover, given the lack of any clear constitutional mandate and the fact that the matter is essentially a policy issue, resting on values and beliefs regarding the operation of a democratic government, the Court finds that it must give considerable deference to the policy pronouncement set forth in the General Assembly's declaration of statewide concern. Therefore, the Court determines that, to the extent that the COML and the Charter conflict, i.e., that the COML forbids what the Charter authorizes or vice versa, *Commerce* City, 40 P.3d at 1284, the COML provides the applicable law with respect to the executive sessions regarding the appointment of the City Manager. Thus, the Court next turns to an analysis of the relevant sections of the COML.

4. The "Personnel Matters" Exception

With respect to the executive sessions involving the appointment of a new City Manager, the City and Prairie Mountain focus primarily on the "personnel matter" exception to the COML, which provides in relevant part as follows:

> (4) The members of a local public body . . . upon the announcement by the local public body to the public of the topic for discussion in the executive session, including the specific citation to the provision of this subsection (4) authorizing the body meet in an executive session and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of

> considering any of the following matters; except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action . . . shall occur at any executive session that is not open to the public:
>
> …
>
> (f) (I) Personnel matters except if the employee who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting. . . .
>
> (II) The provisions of subparagraph (I) of this paragraph (f) shall not apply to discussions concerning any member of the local public body, any elected official, or the appointment of a person to fill the office of a member of the local public body or an elected official or to discussions of personnel policies that do not require the discussion of matters personal to particular employees.

C.R.S. §24-6-402(4)(f) ("Subsection 4(f)").

A statute should be interpreted to give effect to the General Assembly's intent, giving the words their plain and ordinary meaning, and giving effect to all of its parts as a whole. *Wolf Creek Ski Corp. v. Bd. of County Comm'rs of Mineral County*, 170 P.3d 821, 825 (Colo. App. 2007). When construing a statute, a court must look at the context in which a statutory term appears, and the meaning of a word may be ascertained by reference to the meaning of words associated with it. *Jilot v. State*, 944 P.2d 566, 569 (Colo. App. 1996). Courts "are not to presume that the legislative body used the language idly and with no intent that meaning should be given to its language." *Platt*, 214 P.3d at 1063 (quoting *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.,* 919 P.2d 212, 218 (Colo.1996)).

If the language of a statute "is clear and the intent of the General Assembly may be discerned with certainty, [a court] need not resort to other rules of statutory interpretation." *W. Fire Truck, Inc. v. Emergency One, Inc.,* 134 P.3d 570, 573 (Colo. App. 2006). If the language is ambiguous, however, a court must look to "legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme to ascertain the correct meaning of a

statute." *Bd. of County Comm'rs v. Costilla County Conservancy Dist.,* 88 P.3d 1188, 1193 (Colo. 2004). Courts also presume that the legislature intended a just and reasonable result, C.R.S. § 2-4-201(1)(c), and will not interpret a statute in a manner that leads to an absurd or unreasonable result. *In re Marriage of Roosa,* 89 P.3d 524, 528 (Colo. App. 2004).

The ultimate dispute regarding this "personnel matters" provision is whether it permits a local public body to convene an executive session to consider applicants for a position who are not currently employees of the local entity. In this case, as noted above, none of the three finalists for the City Manager position were employees of the City.

The City argues that the term "personnel matters" must be interpreted to include hiring, whether or not the applicant for the position at issue is an employee. In other words, the City focuses on the issues or functions involved, not on the characteristics of the individual or individuals considered in relation to those issues. In contrast, Prairie Mountain argues that the term excludes all who are not employees, and thus the provision, although allowing for executive sessions where an applicant is a City employee, does not apply if the applicant is not an employee. In other words, Prairie Mountain focuses on the characteristics of the individual or individuals considered, not the issues or functions involved.

The Court acknowledges that both positions find some support in the plain language of the statute and that neither is free from legitimate objections. On balance, however, the Court determines that the City's interpretation is correct. First, the City's interpretation best fits the plain language of the term "personnel matters." Even if one accepts the more restrictive definition of "personnel" offered by Prairie Mountain—"a body of persons employed" or "persons employed in any work, enterprise, service, establishment"—rather than that offered by the City—"a body of employees that is a factor in business administration esp[ecially] with

respect to efficiency, selection, training, service and health"[2]—the Court concludes that the term when combined with "matters" is commonly understood to include the hiring and selection of applicants for City positions, whether or not they are currently employees.

The Court determines that this interpretation is particularly appropriate in light of the fact that the General Assembly combined the term "personnel" with the general term "matters." The term "matters," as a plural in this context, means "something (as information or a topic of discussion) of a particular nature or involving a particular and often specified thing or relation." II Webster's Third New International Dictionary 1394 (1986). Thus, the phrase as a whole appears to establish a range of issues or functions, including the selection and engagement of those outside the City, rather than as discussions involving only a limited group of people. This set of functions is captured by the definition offered by the City, as well as another definition of the term "personnel" as "the division of an organization concerned primarily with the selection, placement, and training of employees and with the formulation of policies, procedures and relations with employees or their representatives." In other words, the Court concludes the common meaning of the term is commonly understood as including issues of the particular nature, including hiring and appointment of applicants who are not yet employees, typically handled by the "personnel" division. This reading is reinforced by the common meaning of the similarly structured phrase "personnel administration" or "personnel management": "the phase of management concerned with the engagement and effective utilization of manpower to obtain optimum efficiency of human resources." *Id.*

---

[2] The City states that "personnel" as an adjective means "influenced by *personnel*." This is not correct. The City apparently became confused by the portion of the definition setting forth the term's etymology

This reading finds further support in other provisions of the statutes, such as Subsection 4(f)(II). That subsection limits and thus clarifies the scope of Subsection 4(f)(I). In particular, it provides that Subsection 4(f)(I) does not apply to "the appointment of a *person* to fill the office of a member of the local public body or an elected official." (Italics added.). The use of the term "person" here supports the City's position that "personnel matters" includes issues involving non-employee applicants, for if it did not the General Assembly presumably would have used the more limited term "employee" instead. *Platt*, 214 P.3d at 1063 (holding that courts should not presume that the legislative body used a term idly or without purpose). In addition, as the City pointed out, generally appointments to fill the office of a member of a local public body or an elected public official of the City do not involve current employees. In fact, the Charter provides that "no person who is an employee of the City, or a City board or commission member, may serve as Mayor or Council member." Charter § 3-3(d).

Subsection 4(f)(II), by excluding "discussions of personnel policies that do not require the discussion of matters personal to particular employees," further supports the Court's conclusion that "personnel matters" refers to a range of issues or functions, rather than to discussions of a particular group of people. That is, if "personnel matters" only involved discussion of "a certain group of people," as Prairie Mountain would have it, the provision would be unnecessary, because, by definition, such matters would not include discussion of personnel policies. However, if "personnel matters" refers to a discussion of a range of issues, as determined above, then the provision has a purpose.

The Court further agrees with the City that this interpretation has the advantage of avoiding the inconsistent approach to executive sessions that would result if Subsection 4(f) applied only to the hiring of existing employees. In the Court's view, it makes little sense to

allow the Council to convene an executive session to consider appointing a current city employee as City Manager, but not to allow it to do so to consider the appointment of a non-employee to the same position. There is no basis for this disparity in the statute itself or in any of the legislative history cited by Prairie Mountain, and it is contrary to the basic principle that applicants should be afforded, to the extent possible, equal treatment during the hiring or appointment process. In addition, this interpretation is not in accord with the common meaning of "personnel matters" discussed above, because the issue of hiring in general is not commonly understood as being divided in this way.

Prairie Mountain relies heavily on the fact that the General Assembly specifically refers to "applicant" in C.R.S. § 24-6-402(3)(b)(I) ("Subsection 3(b)"), but does not do so in Subsection 4(f). Subsection 3(b) addresses meetings of state rather than local public bodies "to consider the appointment or employment of a public official or employee or the dismissal, discipline, promotion, demotion, or compensation of, or the investigation of charges or complaints against, a public official or employee, unless said applicant, official, or employee requests an executive session." This omission however, makes sense—and in fact supports the position of the City—when one considers the fundamental difference between the two provisions.

Specifically, Subsection 4(f) presumes that personnel matters will be discussed in executive session, while Subsection 3(b) presumes they will be discussed in open session. Thus, the exception to the general presumption in Subsection 4(f) involves requesting an executive session, while the exception to the general presumption in Subsection 3(b) involves a request for an executive session. As the legislative history provided by Prairie Mountain suggests, the exception in Subsection 4(f) appears to be designed to provide protection for employees who

may be the subject of disciplinary proceedings, *see* Testimony of Representative Cox before the House Judiciary Committee, February 26, 1991, at 10:06 a.m. [CD4: 1:50 – 9:48], Ex. 1 to Henning Aff., at 5, or who are whistleblowers, *see* Testimony of Representative Knox, *id.* at p. 9-10; *see also* Note*, Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 Harv. L. Rev. 1199, 1208 (1962) (noting that a number of state open meetings laws "afford the employee some protection" against "irresponsible character assassination or political favoritism" by "granting [the employee] the option to demand a public hearing"). This particular exception, therefore, does not apply to applicants, who can not be whistleblowers or the subject of disciplinary proceedings. In contrast, the exception in Subsection 3(b) involves opting *into* executive session and thus is based on protecting the privacy of individuals. This rationale applies to everybody, whether applicants or employees, and therefore the specific mention of "applicant"—the only instance in the Subsection 3 where the term is used—is necessary in this subsection but not in Subsection 4(f)(1). Therefore, although the Court agrees with Prairie Mountain that the terms "applicant" and "employee" must be given different meanings, it concludes, in light of this analysis, that doing so does not support Prairie Mountain's position.

Admittedly, the Court's interpretation results in a discrepancy between the rights of applicants who are also employees—as they can demand an open session—and those of applicants who are not employees—who can not demand an open session. However, the Court finds this discrepancy does not result in any absurd result or fundamental unfairness and, indeed, is most likely a result of the fact that the General Assembly did not consider the exception as applicable in the context of hiring, where issues of discipline and whistleblowing would be unlikely to arise. Moreover, although the Court may not speculate as to the basis for the

discrepancy, if any, it concludes that the City's suggestion provides a plausible rational basis for it.

The Court's interpretation of Subsection 4(f) is also buttressed by the fact that the limiting provisions in both cases—Subsection 4(f)(II) and Subsection 3(b)(II)—are virtually identical. This supports the view that the scope of Subsection 4(f)(I), if not its structure, is the same as the scope of Subsection 3(b)(II), which very clearly involves the discussion of a set of issues, i.e., "the appointment or employment of a public official or employee or the dismissal, discipline, promotion, demotion, or compensation of, or the investigation of charges or complaints against, a public official or employee," clearly including consideration of non-employee applicants. This is confirmed by the legislative history, which indicates that the legislators considered the scope of Subsection 4(f) to be the same as that of Subsection 3(b).

Prairie Mountain places considerable weight on the fact that "personnel matters" in Subsection 4(f)(b) is qualified by the following phrase: "except if the employee who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting." The Court agrees with Prairie Mountain that this phrase could be read as reflecting an assumption that executive sessions under the personnel matters exception would invariably involve an "employee" or "employees." The Court concludes, however, that this is too slender a reed to support, by itself, Prairie Mountain's position, especially in light of the countervailing considerations above. Moreover, the Court disagrees that the phrase requires the reading urged by Prairie Mountain. Indeed, simply changing the word "the" before employee to "an" removes any basis for Prairie Mountain's position. The Court believes that if the General Assembly had intended to limit

Subsection 4(f) only to discussions of employees, it would have said so directly and not relied on the use of the word "the" to carry so much legal import.

Prairie Mountain also argues that to the extent the term "personnel matters" might also, under a commonly accepted meaning, involve the hiring of individuals who are not employees, as the City urges, the Court should adopt the meaning that minimizes the exception and thus provides for greatest public access, as it urges, relying on cases such as *Bagby v. School Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974) (holding that COML, as a remedial statute, should be interpreted in the way most favorable to its beneficiary, i.e., the public). Although the Court does not disagree with this principle, it determines, as discussed above, that the limited reading proposed by Prairie Mountain is not in accord with the commonly accepted meaning of the term or the other provisions in the statute and therefore is not a viable interpretation.

Prairie Mountain relies on a Temporary Restraining Order issued in 1997 by the Honorable Theresa M. Cisneros of the District Court in El Paso County finding that Subsection 4(f) is "limited to discussions of issues concerning current employees, not applicants for government employment." At most, the orders of other District Courts can serve as persuasive authority for this Court, but only if the judge sets forth the reasoning used to reach his or her conclusions. In this case, the order contains no explanation of the conclusion and therefore provides no useful guidance to the Court in performing its job of applying the applicable law to the facts in this case. Nor may this Court afford any weight to a settlement agreement, such as that entered into by Saguache County, regardless of the nature or size of the entity entering into the agreement, in performing its duty to apply the law to the facts of this case.

In sum, the Court concludes that Subsection 4(f) allows the Council to convene an executive session to consider the appointment of non-employee applicants to the position of City

Manager. This conclusion is supported by the plain language of the provision, the language and structure of the COML as a whole, and, to the extent applicable, the legislative history.

5. Charter Section 4-4(c)

The Court must next consider Charter Section 4-4(c)(5) to determine whether it conflicts with the requirements of the COML. This section provides in relevant part:

> [A] meeting may be recessed into an executive session by the affirmative vote of two-thirds (2/3) of the members of the Council present, for the following purposes only:
> …
> (5) For personnel matters.

"In interpreting a charter provision, a court must construe it according to its plain meaning." *Glenwood Post v. City of Glenwood Springs*, 731 P.2d 761, 762 (Colo. App. 1986) (citing *Turner v. Rossmiller,* 532 P.2d 751, 754 (Colo. 1975). "However, if the meaning or scope of a word used in a charter provision is susceptible to different interpretations, the interpretation given to it by the city is persuasive." *Glenwood* Post, 731 P.2d at 762 (citing *Mile High Enters., Inc. v. Dee,* 558 P.2d 568, 571 (Colo. 1977) (discussing that construing a city charter requires a court to give consideration to the interpretation of the executive and legislative divisions of city's government).

In light of the Court's conclusions above, the term "personnel matters" must be construed, according to its plain meaning, to include consideration of non-employee applicants. This matches the City's own interpretation of the provision and the statement in the "Prefatory Synopsis" to the Charter that the "matters for which an executive session may be held" and "the procedure for going into an executive session [both] generally follow the State statutes." Here, the Court finds no conflict between the COML and the Charter on this issue, and therefore finds that the two provisions may coexist. However, to the extent that the shorter Charter provision

does not address a particular issue between the two documents (e.g., when an employee who is the subject of an executive session requests an open session or the Council wishes to convene an executive session to discuss personnel policies that do not require the discussion of matters personal to particular employees), the COML controls.

6. Conclusions and Declarations of Law with regard to "Personnel Matters" Exception under the COML and the Charter

In sum, the Court concludes and declares that the matter at issue—the conduct of Council meetings related to the appointment of a City Manager by the Council—is a matter of mixed state and local concern. It further concludes and declares that both Subsection 4(f) of the COML and Charter Section 4-4(c)(5) allow the Council to convene executive sessions for the purpose of considering non-employee applicants for the post of City Manager. Because of these conclusions, the Court need not consider the extent to which Charter Section 4-4(c)(1) (the exception for negotiations), C.R.S. § 24-6-402(3.5) (the search committee provision), or C.R.S.§ 24-6-402(4)(g) (executive sessions regarding certain documents) might also apply to this issue.

The Court believes that the above declarations address Prairie Mountains' Third Counterclaim and most of the concerns related to the City's claim for declaratory relief regarding the COML and the Charter. However, the Court declines to grant Prairie Mountain's Second Claim for Relief, requesting a declaration that "the hiring of the City Manager under the facts as averred herein is not a matter of purely local concern." As the Court has framed the "matter" above, this question is not an actual controversy in this case and the Court therefore need not, and indeed may not, address it under C.R.S. § 13-51-110.

C. Additional Issues Regarding the August 26 and September 7 Executive Sessions

1. The Nomination of an Acting City Manager

A secondary issue in this case, raised by Prairie Mountain, is whether the Council violated the COML by deciding in executive session on August 26, 2010 to propose to appoint, i.e., nominate, the Assistant City Manager as Acting City Manager at the next public meeting. Prairie Mountain alleges that this action violated the COML because it constituted the "adoption" of a "position" in violation of Subsection 4, which provides "that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action … shall occur at any executive session that is not open to the public." C.R.S. § 24-6-402(4).

The City responds that the issue is controlled by the Charter, which does not prohibit the adoption of a "position" in an executive session and in fact allows executive sessions, under Section 4-4(c)(1) "to determine a position relative to issues subject to negotiation, to receive reports on negotiations and status, to develop negotiation strategy, and to instruct negotiators." Alternatively, the City argues that the COML allowed it to make a decision regarding the nomination of the Acting City Manager under C.R.S. § 24-6-402(4)(e) ("Subsection 4(e)"), which provides and allows a local public body to convene an executive session for "[d]etermining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators[.]" Prairie Mountain responds that the City's position relies on an overly broad reading of the phrase "matters that may be subject to negotiations."

The Court concludes, based on the above analysis of the relationship between the COML and Section 6(a), that the conduct of meetings related to the appointment of an Acting City

Manager, is a matter of mixed state and local concern, and therefore, is controlled by the COML to the extent that there is any conflict between it and the Charter. Under the COML, the issue is whether the decision to nominate the Assistant City Manager as the Acting City Manager at the next meeting involved "determining positions relative to matters that may be subject to negotiation" or constituted the "adoption" of a "position."

The parties do not cite, and the Court is not aware of, any binding precedent defining the parameters of Subsection 4(e). Therefore, the Court is left with the plain language of the provision. Although the distinction between "determining positions relative to matters that may be subject to negotiation" and the "adoption" of a "position" may be difficult to determine in the abstract, the Court concludes generally, for the purposes of this order and subject to further refinement after consideration of the tape of the executive session at issue, that Prairie Mountain's position better fits the plain language of the statute.

Specifically, "determining positions relative to matters that may be subject to negotiation" means determining positions on the very issues that may be negotiated, not determining positions on any issue that may somehow be related to issues that may be negotiated. In particular, the Court concludes that application of Subsection 4(e) requires it to distinguish between determinations of positions on the issues that may be subject to arms-length negotiation between the City and another party and the City's unilateral decisions about such negotiations, e.g., to begin or end negotiations with a particular party. Although decisions in the latter class are related to negotiations, they are not themselves subject to negotiation, and thus fall outside of the exception.

This conclusion does not, as the City claims, mean that all consideration related to such decisions about negotiations must occur in public session. As the City points out, Subsection

4(e) allows the Council to consider "developing strategy for negotiations" in executive session, which could include a discussion of whether to begin or end discussions with a particular party. The key is that the Council must adopt its position on such an issue publicly.

This conclusion finds support in *Walsenburg Sand & Gravel Co.*, *Inc. v. City Council of Walsenburg*, 160 P.3d 297 (Colo. App. 2007), which addressed the exception in Subsection 4(a)in the context of a real estate transaction. In that case, the court noted that the council could "consider the sale of real property" in executive session, but could not decide to accept the offer except in a public session. *Id.* at 299-300. This conclusion is also supported by the general principle that that the COML, as a remedial statute, should be interpreted in the way most favorable to its beneficiary, i.e., the public, so that exceptions to the requirement to formulate public policy in the open be construed narrowly. *See, e.g., Bagby*, 528 P.2d at 1302 (Colo. 1974); C.R.S. § 24-6-401 (stating that it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret").

Thus, the Court disagrees that the decision to nominate a person to serve as Acting City Manager is indisputably a position relative to a matter that may be subject to negotiation. Whether to nominate an individual to a position is not a matter of negotiation; rather, it is the Council's decision, to make as it pleases, like the decision to accept an offer regarding real estate in *Walsenberg*, 160 P.3d at 300. Once the nomination was made and the Council voted on the issue, then there may have been matters subject to negotiation, including the terms of the Acting City Manager's employment. However, these do not appear to be the issues discussed at the executive session in question.

To hold otherwise would be to render the prohibition against the adoption of positions in executive session meaningless, as the Court can not imagine many decisions that, in some way,

could not be construed as related in a broad sense to a matter that may be subject to negotiation. As Prairie Mountain points out, the City's interpretation provides no meaningful limit to the exception set forth in Subsection 4(e) but allows it to swallow whole the prohibition on the adoption of positions in executive sessions.

The Court is also not convinced by the City's argument that its position is bolstered by the portions of Subsection 4(e) allowing local public bodies to convene executive sessions to "develop strategy for negotiations" or for "instructing negotiators." Rather, these provisions reinforce Prairie Mountain's view that the legislature intended to limit the exception to issues actually subject to negotiation, such as terms of employment, because these other statutory phrases implicitly assume the existence of pending negotiations rather than merely hypothetical negotiations that may never occur; that is, there can be no basis for "developing strategy" or "instructing negotiators," and thus no reason to invoke these provisions, until there are concrete issues to negotiate.

The Court also does not agree that limiting the term "negotiations" to only those negotiations that involve "arms-length" dealings with third parties completely addresses the issue. Although this represents an appropriate additional limitation on the exception—and the Court accepts it, as indicated above—it is not a sufficient limitation to the exception by itself, because it is abstract, highly subjective, and untied to any specific circumstance or event.

Accordingly, the Court rejects the City's position that the nomination of an Acting City Manager clearly falls into the exception created by Subsection 4(e). However, as noted above, it reserves a final ruling on whether any action taken by the Council at the August 26 executive session violated the COML, and possibly a refinement of its position above, until after it has

considered the tape of the executive session at which this action allegedly occurred, as ordered below.

2. Elimination of One Finalist

Prairie Mountain also alleges that the Council violated the COML by deciding in executive session to eliminate one of the three finalists for the City Manager position from consideration. The City relies again on Subsection 4(e), arguing that its decision was the determination of a negotiation position, "namely the decision to end negotiations with one of the Finalists and continue negotiations with the other two and … keep open the possibility that the eliminated Finalist, Matthew J. Brower, could be brought back into the negotiations."

Following the reasoning above, the Court finds that Subsection 4(e) controls and that it did not allow the Council to make the decision at issue in executive session. As with the decision to nominate the Assistant City Manager as the Acting City Manager, the decision to eliminate one finalist from contention is not a position on a matter that might have been subject to negotiation but a decision about the negotiations themselves. The decision not to continue consideration of Brower was the Council's to make, as it pleased, and there was no opportunity for Brower to "negotiate" with the Council regarding that decision. The fact that the Council would likely need to negotiate the terms of employment with the candidate to whom it offered the City Manager position does not transform all decisions made by the Council during the selection process into a position relative to a matter that may be subject to negotiation. As discussed above, if this were the case, the exception in Subsection 4(e) would swallow the general rule that a local public body may not adopt a "position" in executive session.

Accordingly, the Court rejects the City's position that the elimination of Brower from consideration for the City Manager position clearly falls into the exception created by Subsection

4(e). However, as noted above, it reserves a final ruling as to any violation of the COML until after it has considered the tape of the executive session at which this action allegedly occurred, as ordered below.

3. Decision to Initiate this Action

Prairie Mountain alleges that the City violated the COML by deciding, in executive session, to initiate this action against it. The City responds that the decision to initiate this action was an administrative matter made by the City Manager, not the Council, pursuant to his authority under the Charter. However, the City acknowledges that there is no law prohibiting the Council from authorizing or directing the City Manager to do so. Prairie Mountain responds that courts in other jurisdictions generally require that a public body's make a decision to initiate a lawsuit in a public meeting.

Applying the reasoning above, the Court again agrees with Prairie Mountain. Although discussion regarding such a decision with the City Attorney is unquestionably privileged as an attorney-client communication and may also fall under Subsection 4(e), the decision to authorize or direct the City Manager and/or City Attorney to file a lawsuit itself is at a minimum the adoption of a position, if not a formal action, and thus must occur in open session. As with the other two issues, the decision to file this action is not a matter that may be subject to negotiation, but one that the Council was free to make unilaterally.

This conclusion, however does not prevent the Council under the COML from receiving additional advice and other communications regarding this action from the City Attorney in executive session, to consider the determination of positions relative to matters that may be subject to negotiation, such as the terms of a settlement agreement between the parties, or to develop a negotiation strategy or to instruct negotiators on such matters.

The Court is unable to determine from the pleadings the exact nature of the Council's action regarding the initiation of this action at the September 7, 2011 executive session. In addition, given that the relevant discussion was apparently not taped, the Court sees no means of resolving this issue beyond its ruling above. Therefore, although the Court will review the taped portion, as ordered below, it sees no need for additional relief regarding this issue.

4. Conclusions

Accordingly, the Court concludes and declares that the COML controls the issue of the conduct of meetings regarding the nomination of an Acting City Manager, the termination of consideration of one of the finalists for City Manager, and the decision to initiate this action. The Court concludes and declares, in line with the COML, that the exception set forth in Subsection 4(e), that "determining positions relative to matters that may be subject to negotiation" means determining positions on the very issues that may be negotiated, not on any issue that may somehow be related to issues that may be negotiated. In other words, the Court concludes that application of Subsection 4(e) requires it to distinguish between determinations of positions on matters that may be subject to negotiation and decisions about the negotiations themselves, e.g., to begin or end negotiations with a particular party. Although decisions in the latter class involve negotiations, they are not themselves subject to negotiation, and thus fall outside of the exception.

The Court believes that the above conclusions and declarations resolve the balance of the issues raised by the City's request for declaratory relief regarding the COML and the Charter. The Court declines to grant Prairie Mountain's Fourth Counterclaim, which seeks a declaratory judgment "that the [] Council is prohibited under the COML from making an 'informal' decisions by vote, consensus, or other means, in the course of an executive session." On the

state of the record at present, the Court finds that the requested declaration does not resolve any dispute regarding the parties' respective rights and responsibilities under the COML, but rather is a vague and ambiguous attempt to restate existing law. C.R.S. § 13-51-110 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.").

V. ANALYSIS OF APPLICATION FOR *IN CAMERA* REVIEW

Following the analysis and conclusions above, the Court is now in a position to consider Prairie Mountain's First Counterclaim, an application for an *in camera* review of the recordings of the August Executive Sessions and the September 7 executive session held by the Council. In ruling on an application for *in camera* review of the recording of an executive session, the requesting person or entity must "show grounds sufficient to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters" not enumerated in the relevant sections of the COML. C.R.S. § 24-72-204(5.5)(a). If the court determines, following the *in camera* review, that such discussions occurred, then the portion of the record of the executive session that contains the discussion shall be open to public inspection. C.R.S. § 24-72-204(5.5)(b)(II).

In light of the above analysis, the Court finds that Prairie Mountain has failed to meet its burden of showing grounds sufficient to support a reasonable belief that the Council engaged in substantial discussion of matters not enumerated in Subsection 4 during the executive session on August 20 and August 24, 2010. Given the undisputed facts, the discussions during these sessions all fell under Subsection 4(f) as "personnel matters." Therefore, this portion of the application is denied.

However, the Court finds that Prairie Mountain has met its burden, under the undisputed facts, of establishing that the Council engaged in substantial discussions of matters not enumerated under Subsection 4 during the August 26 and September 7, 2010 executive sessions. These sessions, in part, apparently involved the adoption of positions regarding the nomination of an Acting City Manager, the termination of consideration of one of the finalists, and the decision to authorize or direct the City Manager to initiate this action. Accordingly, this portion of the application is granted, and the City is ordered to produce to the Court within 10 days of this order the tape recordings of these sessions.

VI. ATTORNEY FEES AND COSTS

Prairie Mountain requests that the Court award its reasonable attorneys fees and costs, pursuant to C.R.S. § 24-6-402(9), which requires a court, in "any action in which the court finds a violation" of the COML, to award to "the citizen prevailing" his or her (or, perhaps, its) costs and reasonable attorney fees. The Court reserves ruling on this issue until it determines, following the *in camera* review ordered above, whether the City has violated the COML. At that point, the Court will consider—and may seek additional briefing—regarding the determination of the "prevailing party" in this action. However, the Court rules at this time that Prairie Mountain's action was not frivolous, vexatious, or groundless, and therefore that the Court may not award attorney fees and costs to the City even if it ultimately finds it to be the prevailing party.

VII. CONCLUSION

Accordingly, the Court DENIES Prairie Mountain's application for an *in camera* review of the tape recordings of the August 20 and 24, 2011 executive sessions, GRANTS Prairie Mountain's application for an *in camera* review of the tape recordings of the August 26 and

September 7, 2011 executive sessions, and ORDERS the City to provide the Court with copies of the tapes of the latter two sessions within 10 days of this Order.

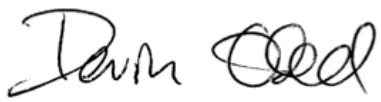
In addition, the Court concludes and declares as follows:

1. The "matter" at issue with respect to the relationship between the COML and the Charter under the home-rule powers granted by the constitutions is the conduct of Council meetings related to the appointment of a City Manager by the Council.
2. The conduct of Council meetings related to the appointment of a City Manager by the Council" is a matter of mixed state and local concern.
3. To the extent that the COML and the Charter conflict with respect to the conduct of Council meetings related to the appointment of a City Manager by the Council, the COML controls.
4. Both Subsection 4(f) of the COML and Charter Section 4-4(c)(5) allow the Council to convene executive sessions for the purpose of considering non-employee applicants for the post of City Manager under their respective "personnel matters" exceptions to the open meeting requirements.
5. Based on the reasoning supporting the conclusions above, the COML rather than the Charter controls the issue of the conduct of Council meetings regarding the nomination of an Acting City Manager, the termination of consideration of one of the finalists for City Manager, and the decision to initiate this action.
6. The phrase "determining positions relative to matters that may be subject to negotiation" in Subsection 4(e) means determining positions on the actual issues that may be negotiated in impending negotiations with third parties, not on any issues that may somehow be related to issues that may be negotiated. In

particular, the Court concludes that application of Subsection 4(e) requires it to distinguish between determinations of positions on the issues that may be subject to negotiation between the City and another party and the City's unilateral decisions about the negotiations themselves, e.g., to begin or end negotiations with a particular party. Although decisions in the latter class are related to negotiations, they are not themselves subject to negotiation, and thus fall outside of the exception.

Dated this 10th day of June, 2011.

BY THE COURT:



Devin R. Odell
District Court Judge