



August 29, 2016

Agenda Item 2

To: LMCIT Board of Trustees

From: Dan Greensweig

Re: **City of Lake Elmo Coverage Terms**

Attachment

- (2a) Appendix A – Lake Elmo Premiums and Losses

Recommendation

Impose a \$250,000 deductible on the City of Lake Elmo's liability claims except those for property damage and bodily injury, to begin as soon as reasonably possible under the terms of the covenant.

Summary

The City of Lake Elmo has had significant turmoil within city hall for the last two years. Beginning last summer, LMCIT has provided the City with a variety of kinds of assistance in an effort to help the City resolve the underlying conflicts. Although Councilmembers have been willing to engage with LMCIT as individuals, and there have not yet been a large number of claims in the City, the amount of employee turnover and the ongoing inability of Councilmembers to work as a group has led staff to make this recommendation to impose conditions on the coverage LMCIT offers to the City.

Discussion

The City of Lake Elmo has long been a place in which officials have had strongly held beliefs about development. As far back as 2004, the City's disagreement with the Metropolitan Council over future growth reached the Minnesota Supreme Court. While the intensity of the City's positions was notable, it was also the result of public policy decisions that are best left to the City's appointed and elected officials. As a result, LMCIT did not, and does not, have an opinion as to what sorts of land use regulations or decisions are appropriate for Lake Elmo.

More recently, however, the City began to struggle with the process by which it makes decisions. This has shown itself in three important ways.

First, it has led to conflict between Councilmembers, which has generally presented itself as a struggle between two loosely organized factions. While Councilmembers on either side do not always vote in lockstep, there is a good deal of predictability about how votes on controversial topics will turn out. Prior to the 2014 elections, they often split 4-1. After the elections, they have often gone 3-2 the other way.

Second, the conflict has spilled over into relationships between Councilmembers and City staff.

Third, the Council is witnessing a deterioration of its relationships with other governmental bodies and with the public.

What follows is a description of major controversies that have taken place in the City over the last two years. It is not all inclusive and there have been any number of other contentious exchanges at Council meetings and elsewhere, but it offers a reasonable overview of the City's difficulties. Where appropriate, links to newspaper articles have been provided.¹

- In September 2014, a Councilmember was accused by a City employee of “inappropriate behavior,”² leading the Council majority, on a 4-0 vote,³ to restrict her ability to interact with City employees on a one-on-one basis.

A month later, the Council considered and ultimately declined to take action based on the same Councilmember's alleged hostile interaction with a local reporter after a Council meeting.

The next month, the city administrator alleged the Councilmember had verbally and physically intimidated him.⁴

- In November 2014 election, a new majority was elected. The campaign was marked by a fake website representing itself as run by one of the candidates who ultimately won election. It was created by an unknown person and contained what the candidate believed were malicious “half-truths and lies.” <http://www.twincities.com/2014/10/18/lake-elmo-city-council-race-becoming-battle-over-growth/>

In July 2015, an unknown individual created a fake Facebook profile of one of the Councilmembers in the new majority. The profile superimposed the Councilmember's photo on the Confederate flag. The Washington County Sheriff's department initiated an investigation. <http://www.twincities.com/2015/07/18/lake-elmo-city-council-member-anne-smith-target-of-facebook-hoax/>

- In December 2014, an outside law firm was retained to investigate a City employee's allegations against another employee. <http://stillwatergazette.com/2016/01/15/independent-report-blames-lake-elmo-council-for-dysfunction-at-city-hall/>.

¹ There is some controversy about the extent to which articles have taken things out of context or not completely accurate. That said, a review of video recordings of Council meetings suggests the articles accurately capture the tone of Council meetings and interactions.

² The basis for the complaint has not been made public, although there is no suggestion that the behavior in question was illegal or based on protected class. <http://stillwatergazette.com/2014/09/05/lake-elmo-council-member-restricted-for-inappropriate-behavior-with-city-staff/>

³ When noted, the votes generally split upon the previously remarked factionalized basis.

⁴ This complaint was provided to a local newspaper by unknown persons.

<http://stillwatergazette.com/2015/03/19/harassment-retaliation-could-be-factors-in-zulegers-departure-from-lake-elmo/>

On the advice of the city attorney, the subsequent report was never made public by the City. An unknown person nevertheless provided a copy of the report to a local newspaper in January 2016. At the City's request, the Washington County Sheriff's office conducted an investigation of a potential Data Practices Act violation. The investigation ended when the County Attorney's office concluded the report was not private and that any disclosure was therefore not legally prohibited.⁵ <http://stillwatergazette.com/2016/01/28/sheriffs-office-ends-investigation-after-county-attorneys-office-says-lake-elmo-report-should-be-public/>; <http://stillwatergazette.com/2016/01/28/sheriffs-office-ends-investigation-after-county-attorneys-office-says-lake-elmo-report-should-be-public/>

After another complaint was filed against a City employee, a different law firm conducted an additional investigation. It appears no written report was ever prepared and the results of that investigation have not been made public.

<http://stillwatergazette.com/2016/01/15/independent-report-blames-lake-elmo-council-for-dysfunction-at-city-hall/>

- On March 10, 2015, the Council voted 3-2 to terminate the city administrator. This decision upset many City residents, who presented the Council with a petition asking for reconsideration.

At the March 24, 2015 Council meeting, which was heavily attended by the public, the Council reversed its decision and extended the administrator's contract until January 2016.

<http://www.twincities.com/2015/04/09/lake-elmo-furor-over-city-administrator-lingers/>

In June 2015, the administrator and the City agreed to part ways pursuant to a 5-0 Council vote, although the underlying decision to do so was likely split on a 3-2 basis.

<http://www.startribune.com/lake-elmo-administrator-to-depart-after-months-of-turmoil/306759651/>; <http://www.twincities.com/2015/06/09/lake-elmo-administrator-to-leave-at-end-of-june/>

In July 2015, an interim administrator was hired on a 4-1 vote.

<http://www.startribune.com/lake-elmo-s-new-interim-administrator-seeks-to-keep-city-off-front-page/318515811/>

In January 2016, the interim administrator decided not to apply for the job on a permanent basis. The City eventually hired a permanent administrator from a nearby community.

<http://www.startribune.com/squabbling-lake-elmo-loses-yet-another-top-administrator/372169911/>

- In June 2015, the city attorney and a Councilmember approached LMCIT with a request that we explore whether LMCIT could provide any assistance. After a number of discussions, LMCIT contracted with the Office of Community Dispute Resolution (OCDR) within the Bureau of Mediation Services (BMS). In turn, OCDR provided the City with two highly qualified and experienced communications facilitators in an effort to help the

⁵ Whether the report is public or private is a legally gray area and reasonable lawyers could disagree.

Councilmembers learn to work together more productively.⁶ In addition to paying \$7,970 for Ms. Gourlay's services out of the fund set aside for such purposes, LMCIT staff was also directly involved in these efforts, and has spent somewhere in the neighborhood of 75-100 hours working with the City on these specific issues.

- In October 2015, the Council voted 3-2 to censure a Councilmember for comments he made to a staff member at a previous Council meeting. The motion also prohibited the Councilmember from interacting with staff by phone, or in person unless another Councilmember was present. <http://stillwatergazette.com/2015/10/08/lake-elmo-council-member-bloyer-censured/>

On July 5, 2016, the Council voted 3-1 to censure the Councilmember again for referencing at a Council meeting the incident that had led to the initial censure. <http://stillwatergazette.com/2016/07/11/lake-elmo-council-censures-member-after-unsustained-allegations/>

In August 2016, after receiving an opinion from the city attorney that the restrictions in the censure were not legally enforceable, the Council voted 3-1 to leave the censure in place and make the restrictions "voluntary." <http://stillwatergazette.com/2016/08/13/bloyer-censure-remains-but-restrictions-now-designated-voluntary/>

- In November 2015, by a 3-1-1 vote, the Council decided to hire a parliamentarian to run Council meetings. The Chief Administrative Law Judge from the state Office of Administrative Hearings presided at one meeting and declined to handle any further ones. A private parliamentarian was then hired. That parliamentarian's contract was terminated in June 2016 after the city attorney opined the mayor had the statutory authority and obligation to preside at Council meetings.
- In January 2016, the Council voted 3-2 to terminate the contract city attorney. Although the reasons for doing so are not entirely clear, the attorney, who had been serving since 2008, is a relative of the mayor, who was first elected in 2012. He has since been replaced by Sarah Sonsalla of Kennedy & Graven. <http://www.twincities.com/2016/01/10/lake-elmo-ousts-city-attorney-drawing-charges-of-political-payback/>
- In January 2016, Ms. Gourlay and Mr. Doncavage recommended suspending their work until such time as Councilmembers were better able to make reasonable progress on resolving their issues.
- On June 29, 2016, the Council discussed the possibility of folding the city library back into the county library system. The discussion focused on a city-prepared draft agreement the county had not reviewed or agreed to, even though the county had previously informed the City it needed a decision by July 1 in order for this to happen for the next fiscal year. The county commissioner representing the City was at the Council meeting requested an opportunity to speak to the agenda item, but a 3-2 majority informed him public comment

⁶ Those facilitators were Todd Doncavage, Deputy Commissioner of BMS, and Aimee Gourlay, Executive Director of the Mediation Center, which at the time was affiliated with Hamline University School of Law.

was no longer being taken. The county subsequently informed the City the deadline had passed for including the city library in the county system for the upcoming year.

<http://stillwatergazette.com/2016/07/01/lake-elmo-misses-deadline-cant-join-county-library-system-next-year/>

- On July 19, 2016, the City Council voted 3-2 to adjourn in the middle of public comment after several comments were made that were critical of the ongoing censure issue. <http://stillwatergazette.com/2016/07/25/lake-elmo-meeting-cut-short-during-resident-comments-on-bloyer-censure/>
- In August 2016, after LMCIT staff attended a Council meeting to explain a recommendation to the LMCIT Board about the City's coverage would be forthcoming, a local reporter contacted Councilmembers for comment. One declined to respond. The other four were quoted by the reporter as laying the blame at the feet of those on the other side. <http://www.twincities.com/2016/08/23/lake-elmo-city-council-rudeness-could-mean-higher-insurance-deductible/>

Besides these specific occurrences, there are other indications of trouble at city hall. The City's current administrator is the sixth in the past seven years. Although position changes and consolidations make it a little difficult to precisely gauge staff turnover, six employees left in the first half of 2015, and one estimate puts total turnover at 90% in the last 18 months.⁷

Council meetings display other symptoms of distress. They often last 3, 4, or 5 hours, on occasion stretching far past midnight. Councilmembers are deeply involved in setting the agenda and preparing items for inclusion in the packet, with the result that even approving the agenda has sometimes taken 30 minutes or more. Councilmembers interrupt each other and use Robert's Rules as a way to cut off or wrest control of discussions. Local residents have become increasingly vocal and attend the meetings in large numbers, and it is not uncommon to hear harsh remarks during the public comment period, often directed at individual Councilmembers.

Lake Elmo's Situation

With all that said, however, the reality is there have not been the number of losses one would normally expect to see in this environment. From January 2010 through July 2016, the City has losses of \$232,073, of which \$210,118 is attributable to land use or employment claims. Over the same period, the City has paid premiums of \$445,613. (A more complete breakdown of losses and premiums by type of coverage is contained at Appendix A). A bit more than half that amount can be traced back to a claim from 2010, before the latest round of problems began in earnest, with most of the remainder arising from two claims in the last 18 months.

Of the two relevant open claims, one is a recent claim by the city administrator who was terminated, rehired, and then left again in 2015. The lawsuit includes allegations of defamation and violation of the Minnesota Data Practices Act. <http://stillwatergazette.com/2016/08/07/former-city-administrator-sues-lake-elmo/>.

⁷ <http://www.twincities.com/2016/07/29/in-dysfunctional-lake-elmo-council-seats-arent-for-the-faint-of-heart/>

The second is a claim that originated in 2015, related to a land owner's proposal to create a cemetery and accompanying structures within the City. The dispute centers on whether the proposal is a permitted use under the City's zoning code. The Council's votes with regard to the project and a subsequent settlement proposal have been divided, although that might be largely the result of differing policy positions with regard to the development.

<http://stillwatergazette.com/2015/10/12/council-denies-proposed-lake-elmo-cemetery/>;
<http://www.twincities.com/2016/06/20/lake-elmo-cemetery-is-in-a-zombie-like-state/>

The Board's policy on Members in Turmoil, adopted in 2008, provides that special underwriting action will be considered if the member has already generated an unusual amount of loss cost and the conditions and problems that gave rise to those losses continue to exist. Although losses in Lake Elmo have not risen to the same level we saw in other situations, there has been a precipitous increase in the last two years. If we saw those same losses in a well-functioning city, we might view it as unusual, but part of the risk inherent in running a city. In the case of Lake Elmo, however, those losses are coupled with the continuation of conditions and problems that gave rise to them and that may well give rise to additional claims in the future.

Precedent

Historically, LMCIT has been very reluctant to impose special underwriting restrictions on its members. A summary of previous actions in this regard includes:

Maplewood:

2007	A 10% debit was applied to the City's liability premiums.
2008	A \$200,000 deductible was imposed on employment or related claims. Excess liability and open meeting law coverage were not offered.
2009	No change.
2010	A \$100,000 deductible was imposed on employment or related claims. Other liability coverage was subject to a \$50,000 deductible. Excess liability coverage was offered.
2011	Full coverage was offered.

Total losses for the five year period of 2004-2008 were approaching \$2,500,000 compared to premiums of about \$1,000,000.

Greenfield

June 2009	\$200,000 deductible was imposed on employment-related liability claims and all claims involving suits by current or former city officials or employees against the city or against any other current or former city official or employee.
Nov 2009	Liability coverage was restricted to bodily injury or property damage only.
2010	No change.
2011	Full coverage was offered, subject to a \$50,000 deductible for liability claims other than bodily injury or property damage and exclusions for liability claims brought by City officials and open meeting law claims.
2013	Full coverage was offered.

Total losses for the five year period of 2005-2009 were approximately \$800,000 compared to premiums of about \$100,000.

McGrath

- 2009 Liability coverage was restricted to bodily injury or property damage only. Specifically excluded were claims arising from or relating to the sale, ownership or control of the community center building, and Land Use, Development, and Franchise/Enterprise Operations Litigation.
- 2010 Full coverage was offered, but previously excluded claims were subject to a \$50,000 deductible.
- 2011 Full coverage was offered, but previously excluded claims were subject to a \$10,000 deductible.
- 2012 Full coverage was offered

Total losses for the five year period of 2005-200 were approximately \$230,000 compared to premiums of about \$26,000.

LMCIT's reluctance to impose conditions until significant actual losses have been incurred and can be traced back to problems within the City, a reluctance which current staff generally shares, likely stems from a number of interrelated factors.

First, LMCIT is appropriately careful to avoid weighing in on local policy issues. We have been similarly careful not to involve ourselves in local politics or elections. Both these areas are and should be left to a city's residents and officials to resolve. It is the particular belief of LMCIT staff in this situation that it is group dynamics and internal process defects that are behind much of the conflict and that no one Councilmember or subset of the Council is solely responsible.

Second, while LMCIT is more interested in the process a city uses in working toward its goals, we also recognize that cities operate in a wide variety of ways and that there is no single "best" process all members should adopt. Cities should have freedom to experiment with alternative organizational designs and approaches and LMCIT has historically designed its coverage to encourage and accommodate that.

Third, LMCIT has a very strong history of providing broad coverage designed to allow members to make the decisions they believe are right for their community. We realize members might sometimes make mistakes, and might face claims even when they have not done anything wrong. Our goal is to be there for them in those situations.

Finally, it is relatively easy to point to a series of significant actual losses and decide they have grown to a point where a city has begun to impose an unreasonable burden and risk on other LMCIT members. Without such quantifiable data, whether to impose restrictions requires a heavier reliance on LMCIT staff and Board experience and subjective judgment as to whether a member's actions are creating that same type of unreasonable risk.

At the same time, LMCIT does make somewhat similar judgments in other situations. For example, we have declined to provide coverage for municipal operations that we think are being

operated or maintained in a way that creates an unacceptable risk of loss. We have not always waited for a building to burn down before we decide we will not cover it.

Similarly, we are occasionally approached by potential members for whom we have not provided a quote because we have concluded their operations are different enough that we cannot fully assess the risks they bear and the resulting uncertainty would not be fair to other LMCIT members. The Minnesota Ballpark Authority is one such example.

It also bears mention that LMCIT has invested significantly more time and resources in attempting to help the City resolve its conflicts than it attempted in the prior situations in which underwriting restrictions were put in place, part of the approaches staff has been developing and refining in response to the Board's support of loss control initiatives in this area.

Recommendation

As members of a self-insurance pool, which they own and manage, the cities and other public entities that belong to LMCIT are directly affected by the losses incurred by other members. In the case of Lake Elmo, staff believes the City has reached a point at which its actions are creating an undue risk to other members. The City's conduct has also been noticed and remarked upon by other LMCIT members. If a claim related to the problems in Lake Elmo does arise, it is quite possible other members will question why they should bear part of that burden in light of Lake Elmo's apparent inability or unwillingness to make the changes necessary to operate within normal behavioral parameters.

In light of this, staff is recommending imposing a \$250,000 deductible, an increase from the \$500 deductible the City has had. This would apply to all liability claims except those for property damage and bodily injury. Staff thinks this is an appropriate balance between limiting the risk to other LMCIT members, creating an additional incentive for Lake Elmo to continue working towards a solution to the issues that have been plaguing it, and providing a level of coverage that will be available in the event of a truly catastrophic liability claim.⁸ Staff is also recommending that these restrictions be put in place as soon as reasonably possible, rather than waiting until the City's January 1 renewal date. Under the terms of our covenant, that could happen by providing a 30 day notice of cancelation, which would be followed by an offer of coverage subject to the new terms.⁹

In staff's view, this approach seems to reflect past practice, as does the amount being proposed. Adjusting for inflation, the deductibles used in Maplewood and Greenfield would in today's dollars be approximately \$225,000. Because staff is not recommending any complete coverage exclusions, LMCIT is retaining some additional risk it did not in those situations. And, of course, if there are not additional claims against the City, the increased deductible is largely irrelevant.

In further comparing this proposal to prior actions, a few points are worth mentioning.

⁸ Lake Elmo does not have a police department, eliminating one potential area in which a very large claim could arise.

To begin with, Lake Elmo's population is slightly over 8,000 people. That compares with populations of about 2,800 in Greenfield, almost 40,000 in Maplewood, and 78 in McGrath.

Financial reports for 2014 provided by the Office of the State Auditor show:

- Lake Elmo's revenue was about \$4,800,000. Greenwood's was about \$1,900,000, Maplewood's \$37,000,000, and McGrath's \$65,000.
- Lake Elmo's general fund unrestricted fund balance was about \$2,500,000. Greenwood's was about \$830,000 and Maplewood's \$8,400,000. McGrath's was unavailable.

It should also be noted that staff's recommendation is to apply this higher deductible to a wider range of claims than simply the employment related claims that are often the direct outcome of the sort of turmoil we see in Lake Elmo. There are two primary reasons for this.

The first is that because so much of the conflict relates directly or indirectly to development, many of the issues are particularly exacerbated when land use proposals and applications reach the Council. While, again, LMCIT does not have an opinion as to whether these should be approved, denied, or modified, there is a substantial risk the City will struggle to follow statutory guidelines about when and how those decisions must be made.

The other is that there is an ongoing pattern of confidential information reaching the public, with each faction having potentially benefited from different disclosures. Staff is concerned this could make claims more likely and more difficult to defend.

On the other hand, staff is not recommending completely excluding any type of coverage, as was done in prior situations. While that might ultimately be necessary, staff believes LMCIT can be a more effective long-term resource for the City by providing some level of coverage and assistance with claims that might arise in the future.

These recommendations reflect staff's professional judgment, but the Board has a wide range of other reasonable approaches available to it. This includes taking no action at the present time, restricting coverage or imposing deductibles more or less than has been proposed, or mandating conditions under which existing coverage will be continued.

Options for Lake Elmo

If the Board does determine to create coverage restrictions, the City has a number of options.

- It could choose to accept the new terms and work toward making the kind of progress that would eventually allow us to provide unrestricted coverage again in the future.
- It could look for coverage elsewhere. In light of the experience other cities with these kinds of problems have had, it might be unlikely the City could find comprehensive, affordable coverage, but it is not impossible.

- Regardless of whether it found coverage elsewhere or chose to self-insure, it could choose to terminate coverage with LMCIT and exercise its option to purchase an extended reporting period from us. If that took place, the City would effectively have coverage under the existing terms for claims that occurred prior to termination of the coverage, but we would not provide coverage for claims arising after that termination. The City would also be ineligible to rejoin LMCIT for a minimum of three years.

As a final observation, if Lake Elmo remains an LMCIT member, it is staff's intent to continue to work with the City to the extent that doing so is welcomed and useful, recognizing there are limits on the resources available to do so. Others who are or who previously involved in providing assistance have also indicated their willingness to do so again in the future. All of this, however, would be predicated on an assessment that the City is in a position to make the sorts of changes necessary to move forward in a more productive way.