



LEGAL DIVISION
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DATE: November 3, 2015
TO: Mayor Prussing
CC:
FROM: James Simon

RE: Urbana City Code §§ 2-171 *et seq.* Concerning Indemnification of City Employees.

The Illinois General Assembly passed and the Governor signed into law an amendment to the Local Governmental and Governmental Employees Tort Immunity Act. 745 ILCS 10/1-101 *et seq.* Essentially, the change (745 ILCS 10/2-302) provides that a municipality may not defend, pay for the cost of defense, reimburse the cost of defense, or indemnify an employee who becomes a defendant in any criminal action arising out of or incidental to the performance of his or her duties of employment and who is convicted of any wrongdoing. However, the municipality may reimburse the costs of criminal defense if the criminal action against the employee is dismissed or results in a final disposition which is in favor of the employee.

The amendment becomes effective on January 1, 2017. Even though the effective date is more than a year away, I believe it is prudent to amend the City's indemnification and defense ordinance found in UCC §§ 2-171 *et seq.* now rather than later. I also believe that additional clarification would be useful to address issues where employees use their positions to unlawfully derive financial benefit or gain from the City.

A proposed ordinance amending UCC §§ 2-171, 2-172, 2-173, and 2-175 and adding a new Section 2-177 is attached.

The Legal Division recommends that the City Council adopt the attached draft ordinance in order to assure that the City's legal defense and indemnity ordinance complies with the recent amendments to the §§ 2-171, 2-172, 2-173, and 2-175.

ORDINANCE NO. 2015-11-112

AN ORDINANCE AMENDING URBANA CITY CODE CHAPTER TWO, ARTICLE IX, SECTIONS 2-171 THROUGH AND INCLUDING 2-176 AND ADDING NEW SECTION 2-177 FOR COMPLIANCE WITH NEW STATE STATUTE CONCERNING LEGAL DEFENSE AND INDEMNIFICATION FOR CITY EMPLOYEES AND OFFICIALS

(State Statutory Bar for Providing Legal Defense and Indemnity for Employees Unlawful Criminal, Intentional, Willful, Wanton, Grossly Negligent Conduct)

WHEREAS, the City of Urbana ("City") is a home rule unit of local government pursuant to Article VII, Section 6, of the Illinois Constitution, 1970, and may exercise any power and perform any function pertaining to its government and affairs not otherwise expressly reserved to the State of Illinois by legislation, including authority to pay the cost of defense for and to indemnify employees and elected and appointed officials for claims arising out of the performance of their duties as employees and elected and appointed officials, as the case may be; and

WHEREAS, the City has adopted an ordinance which provides for legal defense and indemnification of City employees and elected and appoint officials who are sued or threatened with suit for damages allegedly caused by their actions when performing their duties as employees and elected and appointed officials, as the case may be (UCC §§ 2-171 *et seq.*); and

WHEREAS, the Illinois General Assembly recently passed and the Governor signed into law an amendment to the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10-101 *et seq.*) which prohibits a municipality from defending, paying the cost of defense, reimbursing the cost of defense, and/or indemnifying any municipal employee and/or an elected or appointed official who becomes a defendant in any criminal action arising out of or incidental to the performance of his or her duties unless the municipal employee and/or elected and/or appointed official is fully exonerated of any criminal liability (745 ILCS 10/2-302); and

WHEREAS, the amendment to Section 2-302 (745 ILCS 10/2-302) is scheduled to take effect on January 1, 2017; and

WHEREAS, the City Council deems it necessary and appropriate to amend UCC §§ 2-171, 2-172, 2-173, 2-174, 2-175, and 2-176 and

to add a new Section 2-177 to the Urbana City Code to bring the City's ordinance concerning the legal defense and indemnification of City employees and elected and appoint officials (UCC §§ 2-171 et seq.) into compliance with the aforesaid newly-enacted state statute and to clarify that those legal defense and indemnification sections apply to elected and appointed city officials.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Urbana, Champaign County, Illinois, as follows:

Section 1.

Urbana City Code Chapter 2, "Administration", Article IX, "Legal Defense and Indemnification for City Employees and Officials", Sections 2-171, 2-172, 2-173, 2-174, 2-175, and 2-176 shall be and hereby are amended as follows with strike-through words representing language to be deleted and underlined words representing language to be added:

Sec. 2-171. - Purpose.

The purpose of this article is to provide for legal defense services and indemnity for employees and elected and appointed officials of the City of Urbana who are sued or threatened with suit for damages allegedly caused by their actions in the performance of their duties as employees and elected and appointed officials. The intent is to provide legal defense services and indemnity to the fullest extent permitted by the home rule provisions of the Constitution of the State of Illinois and this article, even if such is inconsistent with state statutes.

Sec. 2-172. - Definitions.

Appointed officials as used in this article means individuals who are appointed by the mayor, with the advice and consent of the city council, to serve on one or more boards, commissions, and task forces formed by the city. It shall also include the estate or personal representative of the estate of a deceased appointed official.

Defendant as used in this article means any city employee or elected or appointed official sued or threatened with suit as appropriate to the context.

Elected officials as used in this article means the mayor, alderpersons, and the city clerk, even if such person was appointed to fill out an unexpired term. It shall also include the estate or personal representative of the estate of a deceased elected official.

Employee as used in this article means all persons who are employees of the city other than elected officials and includes employees who have concluded employment with the city. It shall also include the estate or personal representative of the estate of a deceased employee.

Indemnity as used in this article means to pay on behalf of a defendant part or all of a judgment based on such claim, action or proceeding or to reimburse the defendant for all or part of any compromise or settlement of such claim, action or proceeding.

Legal defense services as used in this article means undertaking legal representation of the defendant sued (or threatened with suit) by the city attorney or other counsel expressly authorized by the city attorney to appear and defend against the claim, action or proceeding, or reimbursement of the defendant for part or all of his or her court costs and attorney's fees incurred in the defense of such claim, action or proceeding.

Reservation of rights agreement means an agreement between the city and the employee that provides for legal defense of the employee while reserving the rights of the city not to pay the judgment, compromise or settlement until it is established that the injury complained of arose out of an act or omission relating to the employee's duties and was not willful and wanton.

Sec. 2-173. - Employees and commissioners.

(a) *General-Duty to defend.* If a claim, action, or proceeding which is civil in nature is filed against a

defendant for damages allegedly arising out of the actions or omissions of such defendant relating to his/her duties as an employee or elected or appointed official of the city, (regardless of whether such is alleged to be in his or her official or individual capacity, or both) unless the city attorney declines to appear and defend (or withdraws) on the basis that the defendant was guilty of intentional, willful, wanton, or grossly negligent misconduct or despite the allegations, the actions or omissions complained of were not relating to his/her duties as an employee or elected or appointed official (see subsection (d) below), the city shall provide the defendant legal defense services and/or indemnity, to the extent determined by the city. Nothing herein shall preclude the city from undertaking such defense under a reservation of rights.

In the event the city maintains any action or claim against a defendant, whether as plaintiff, claimant, cross-plaintiff, or counter-plaintiff, petitioner or otherwise, no legal defense services or indemnity will be provided to, for or on behalf of the defendant.

(b) *Separate attorney when conflict of interest.* Upon receipt of a declination to defend on the basis of potential or actual conflict of interests or upon withdrawal by the city attorney on the basis of an actual or potential conflict of interest, the defendant may employ his/her own attorney to appear and defend, in which event, if, but for the conflict of interest only, the city would defend, the city shall pay the defendant's court costs, litigation expenses and attorney's fees as they are incurred to the extent approved by the city attorney as reasonable.

(c) *Criteria for determining if conduct was related to duties.* In determining whether the conduct upon which the claim is based was related to or arose out of the defendant's duties as an employee or an elected or appointed official, the following shall be considered:

- (1) Whether the conduct is the kind the defendant is employed or charged to perform;
- (2) Whether it occurred substantially within

authorized time and space limits; and

(3) Whether it was motivated, at least in part, by a purpose to serve the city.

(d) Not related to duties/willful misconduct.

(1) In the event that the city attorney determines that the act or omission upon which the civil claim or action is based was not related to the defendant's duties or was intentional, willful, wanton, or grossly negligent misconduct, or that the defendant personally derived a financial benefit or gain unlawfully, the city shall have no duty to provide defense services or indemnify unless a jury or court expressly finds that the act or omission of the defendant was related to his/her duties as an employee and was not intentional, willful, wanton, or grossly negligent misconduct or intended to provide an unlawful financial benefit or gain for the defendant or another person, in which case the city shall indemnify the defendant for any damages awarded, and court costs and attorney's fees assessed as part of any final and unreversed judgment. In such event, the city shall also pay the defendant's court costs, litigation expenses, and attorney's fees which are not assessed as part of any final and unreversed judgment, to the extent approved by the city attorney as reasonable charges and reasonably related to proper representation of the defendant.

In all cases the defendant shall cooperate in good faith to have special interrogatories and/or jury instructions submitted to the court or jury to determine whether the conduct or inaction which gave rise to the claim or cause of action: (1) was or was not intentional, willful, wanton, or grossly negligent misconduct or did not provide the defendant with an unlawful financial benefit or gain, and (2) was or was not intended to serve or benefit the interests of the city.

(2) The city may elect to defend the defendant under a reservation of rights agreement. If the

city so elects and if the defendant enters into a reservation of rights agreement, the city shall pay the judgment, compromise or settlement only if it is expressly established that the injury arose out of an act or omission relating to the defendant's duties as an employee or elected or appointed official and was not intentional, willful, wanton, or grossly negligent.

(e) *Effect of other proceedings.* The termination of any action, suit, or proceeding by judgment or settlement, conviction, or in a plea of nolo contendere, or its equivalent, shall not, of itself, create a presumption that the act giving rise to the claim did not arise out of actions or omissions of such defendant relating to his/her duties as an employee or elected or appointed official of the city.

(f) *Settlement.*

(1) In any settlement, if the city attorney determines that the conduct or inaction which gave rise to the civil claim or cause of action was intentional, willful, wanton, or grossly negligent misconduct, provided an unlawful financial benefit or gain for th defendant, or was not intended to serve or benefit the interests of the city, the city shall not indemnify the defendant for any damages, court costs, or attorney's fees agreed to as part of the settlement. Otherwise the case may be settled, in the city attorney's discretion and with the defendant's consent and the city shall indemnify the defendant for any damages, court costs, and attorney's fees agreed to as part of the settlement, or shall pay such settlement directly. Where the defendant is represented by private counsel due to the city attorney declining to defend on the basis of an actual or potential conflict of interests, the city attorney shall be informed in writing of all settlement offers. The city attorney and the court having jurisdiction must approve any settlement in order to obligate the city to indemnify the defendant.

(2) If, in the city attorney's sole discretion,

the city attorney determines that a settlement offer is reasonable and the city agrees in writing that it would fund such settlement, and the defendant refuses to settle, the city will continue to defend and/or indemnify the defendant; however, the extent of the city's liability for indemnity will then be limited to the amount of such settlement offer which the city would have accepted. Where the defendant is represented by private counsel due to the city attorney declining to defend on the basis of an actual or potential conflict of interest, the extent of the city's liability for indemnity will be limited to the amount of the settlement offer which the city indicated in writing it would accept, plus reasonable attorney fees incurred as of the date the city agreed in writing to the proposed settlement.

(g) *Determination of coverage.*

(1) If the city attorney determines that a defendant does not come within the provisions of this article, and thus fails or refuses to provide a defendant with a defense, and a court of competent jurisdiction later expressly determines that such claim should have been determined to be within the provisions of this article, then the city shall pay any judgment rendered against the defendant and reasonable costs and fees incurred in obtaining the determination that such claim is covered by the provisions of this article. Nothing in this article shall be construed to deprive a defendant of the right to petition a court of competent jurisdiction to compel the city to perform the duties imposed by this article.

(2) If the city attorney determines that a claim against a defendant comes within the provisions of this article, and if a court of competent jurisdiction later finds that such claim does not come within the provisions of this article, the city may seek reimbursement for any payments made by the city or on its behalf for part or all of any judgment and costs or fees incurred by or on behalf

of the defendant's defense as well as for that part or all of the costs or expenses incurred in obtaining the determination that such claim is not covered by this article.

Sec. 2-174. - Elected and appointed officials.

(a) If an elected or appointed official is sued or threatened with suit for damages allegedly caused by their actions, the city may provide legal defense service and/or indemnity, if the elected or appointed official or commissioner acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the city, provided no such legal defense service or indemnification shall be provided with respect to any claim, issue or matter as to which such person has been adjudged to be liable to the city unless, and only to the extent the court in which such action was brought, shall determine upon application that, despite the adjudication of liability, and in view of all the circumstances, such person is fairly and reasonably entitled to indemnity for such expenses as the court shall deem proper.

The termination of any action, suit or proceeding by judgment or settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption:

(1) That the person did not act in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the city; and

(2) That with respect to any criminal action or proceeding, the person had reasonable cause to believe that his or her conduct was unlawful.

(b) The city may provide legal defense service and/or indemnity as set forth in subsection 2-174(a) to persons who formerly served as mayor, city clerk, alderperson or as an appointed official if the basis of the claim or charge against such person arises out of such person's duties as an elected or appointed official of the city.

(c) Whether or not, and the extent to which, if any, the city shall provide legal defense services and/or indemnification as set forth in subsection 2-174(a), shall be only as authorized in the specific case by a majority vote of alderpersons then holding office who are or were not parties to such suit or action or, if there are less than three such disinterested alderpersons, by the city attorney.

Sec. 2-175. - Matters common to all defendants.

(a) *Determinations under this article.* Unless specifically reserved to the city council, all determinations to be made by the city in administering this article shall be made by the city attorney.

(b) *Conflict of Interest.*

(1) In the event the city attorney determines that for the city to represent a defendant would place the city and the party defended in an actual or potential conflict of interest the city attorney shall promptly decline in writing to appear and defend or shall take appropriate action to withdraw as attorney for such party.

(c) *Continuing review.* The decision to provide or not provide defense services or indemnify may be reviewed and modified at any time when the interests of justice require, and legal defense services or payment therefore, even retroactively, may be authorized as well as indemnity.

(d) *Duty of defendant to notify city.* It is the obligation of the defendant to request in writing within fourteen (14) days after service of a claim, demand, notice, summons or other process upon the defendant that the city provide for defense. Such written request shall be filed together with the claim, demand, notice, summons, or other process with the city clerk and the city attorney. The city, at its sole discretion, may provide a defense for those who fail to make a timely request.

(e) *Cross complaints and counterclaims.* For the

purposes of this article, the city's duty and authority to defend and indemnify a defendant shall extend to a cross-complaint or counterclaim against such defendant, if in the determination of the city attorney, the cross-complaint or counterclaim meets the requirements as set forth for defense if such were contained in an original complaint, and notice is given as set forth in subsection 2-175(d). If the defendant wants to file a counterclaim or cross complaint in any legal proceeding covered by this article, the city reserves the right to separate the costs of defense from the costs associated with presentation of counterclaim or cross complaint. If the city exercises its right to separate such costs the defendant shall be liable for all costs associated with the presentation of the counterclaim or cross complaint.

(f) *Control of litigation.* Whenever the city provides for the defense of any action set forth in this article, as a condition of such defense, the city may assume exclusive control over the representation of such defendant, provided, however, that any defendant may at any time, at the option of the defendant, take control over representation by waiving all rights to all or part of indemnification and rights to payment for costs of defense.

(g) *Insurance.* If any insurance policy provides coverage of the defendant for the allegations made, the city's obligation to pay for legal representation, settlement, judgment, or costs or fees, shall be secondary to such insurance, and the city's obligation to defend and/or indemnify will not begin until the limits of all such insurance policies are exhausted. Nothing contained in this article shall be construed to modify or amend any provisions of any insurance policy in which a defendant is a named insured.

(h) *Non-cooperation.* In the event that a defendant fails or refuses to comply with any of the conditions of this article or fails or ceases to cooperate in good faith, then all the provisions of this article shall be inapplicable and have no force or effect with respect to any such claim or litigation from the time such failure to cooperate first occurs.

If a defendant fails or ceases to cooperate in good faith, but later resumes cooperation in good faith, the city attorney may reinstate the benefits of this article as to such defendant as the city attorney deems appropriate. Failure to cooperate in good faith implies the conscious doing of wrong or actions taken for a dishonest purpose. It involves the actual or constructive fraud or design to mislead or deceive the city, or neglect or refusal to fulfill a duty not prompted by an honest mistake as to one's rights or duties.

(i) *City can employ independent counsel.* The city may provide for the defense of a defendant pursuant to this article by employing independent counsel for this purpose or by asserting the city's right under any appropriate insurance policy which requires the insurer to provide the defense.

(j) *Labor contract.* If a labor union contract covers any of the provisions of this article, all defendants under such contract shall be governed by the provisions thereof rather than the provisions of this article and if any conflict exists between the provisions of this article and the provisions of any such contract, the contract shall control.

(k) *Punitive or exemplary damages.* The city is authorized to pay that part of a judgment that is for punitive or exemplary damages if the city council finds all of the following:

(1) The court judgment is based on an act or omission of a defendant acting in a manner that was related to or arose out of his/her duties as an employee or elected or appointed official; and

(2) That at the time of the act or omission giving rise to the liability, the defendant acted or failed to act in good faith and without actual malice, and in the apparent best interests of the city; and

(3) Payment of the claim or judgment would be in the best interests of the city.

(1) *No modification of immunity or liability intended.* Nothing in this article shall be construed as abrogating or waiving any limitation of liability or immunity presently or hereinafter made applicable to the city or its defendant which would otherwise be applicable to any action or proceeding to which this article would apply.

Sec. 2-176. - Indemnification authorization and limitations.

Notwithstanding anything stated herein limiting indemnification or legal defense services, if it feels justice would be served, the city council may elect nevertheless to authorize indemnification or legal defense services if under all circumstances considered, the city council determines such would be fair and reasonable.

Section 2.

Urbana City Code Chapter 2, "Administration", Article IX, "Legal Defense and Indemnification for City Employees and Officials", shall be and hereby is amended to add the following new Section:

Sec. 2-177. - Bar against providing defense and indemnity in criminal proceedings.

(a) The city shall have no obligation whatsoever to indemnify, defend, or pay or reimburse for the cost of defense of or to pay any judgment, verdict, decree, or order for or on behalf of any city employee who is a defendant in any criminal action arising out of or incidental to the performance of his or her duties unless such employee is fully and wholly exonerated of all criminal actions and charges brought against the employee. The city may reimburse the employee for reasonable defense costs only if the criminal action was instituted against the employee based upon an act or omission of that employee arising out of and directly related to the lawful exercise of his or her official duties or under color of his or her authority and such action or charges are fully, completely and finally resolved in favor of the employee. Nothing herein shall be interpreted or construed as prohibiting the city from

providing defense or paying or reimbursing for the cost of defense of an employee who is called or to be called as a witness in any criminal proceeding and who so testifies in such proceeding.

(b) The city shall have no obligation whatsoever to indemnify, defend or pay or reimburse the cost of defense of any city employee who is a defendant in any criminal or civil action arising out of conduct unrelated to the performance of that employee's duties unless a court expressly determines in writing that the conduct in fact related to the performance of that employee's duties.

(c) The city shall have no obligation whatsoever to indemnify, defend or pay or reimburse the cost of defense of or pay or reimburse for any judgment or decree entered against an employee where such judgment, verdict or decree includes, in whole or in part, punitive or exemplary damages, fines or penalties.

Section 3.

Those sections, paragraphs, and provisions of the Urbana City Code that are not expressly amended or repealed by this Ordinance are hereby re-enacted, and it is expressly declared to be the intention of this Ordinance not to repeal or amend any portions of the Urbana City Code other than those expressly set forth as amended or repealed in this Ordinance. The invalidity of any section or provision of this Ordinance hereby passed and approved shall not invalidate other sections or provisions thereof.

Section 4.

This Ordinance shall not be construed to affect any suit or proceeding pending in any court, or any rights acquired, or a liability incurred, or any cause or causes of action acquired or existing prior to the effective date of this Ordinance; nor shall any right or remedy of any character be lost, impaired, or affected by this Ordinance.

Section 5.

The City Clerk is directed to publish this Ordinance in pamphlet

form by authority of the corporate authorities, and this Ordinance shall be in full force and effect from and after its passage and publication in accordance with Section 1-2-4 of the Illinois Municipal Code.

This Ordinance is hereby passed by the affirmative vote, the "ayes" and "nays" being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

PASSED BY THE CITY COUNCIL this ____ day of _____, _____.

AYES:

NAYS:

ABSENT:

ABSTAINED:

Phyllis D. Clark, City Clerk
APPROVED BY THE MAYOR this ____ day of _____, _____.

Laurel Lunt Prussing, Mayor

ORDINANCE NO. _____

AN ORDINANCE AMENDING URBANA CITY CODE CHAPTER TWO, ARTICLE IX, SECTIONS 2-171 THROUGH AND INCLUDING 2-176 AND ADDING NEW SECTION 2-177 FOR COMPLIANCE WITH NEW STATE STATUTE CONCERNING LEGAL DEFENSE AND INDEMNIFICATION FOR CITY EMPLOYEES AND OFFICIALS

(State Statutory Bar for Providing Legal Defense and Indemnity for Employees Unlawful Criminal, Intentional, Willful, Wanton, Grossly Negligent Conduct)

WHEREAS, the City of Urbana ("City") is a home rule unit of local government pursuant to Article VII, Section 6, of the Illinois Constitution, 1970, and may exercise any power and perform any function pertaining to its government and affairs not otherwise expressly reserved to the State of Illinois by legislation, including authority to pay the cost of defense for and to indemnify employees and elected and appointed officials for claims arising out of the performance of their duties as employees and elected and appointed officials, as the case may be; and

WHEREAS, the City has adopted an ordinance which provides for legal defense and indemnification of City employees and elected and appoint officials who are sued or threatened with suit for damages allegedly caused by their actions when performing their duties as employees and elected and appointed officials, as the case may be (UCC §§ 2-171 *et seq.*); and

WHEREAS, the Illinois General Assembly recently passed and the Governor signed into law an amendment to the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10-101 *et seq.*) which prohibits a municipality from defending, paying the cost of defense, reimbursing the cost of defense, and/or indemnifying any municipal employee and/or an elected or appointed official who becomes a defendant in any criminal action arising out of or incidental to the performance of his or her duties unless the municipal employee and/or elected and/or appointed official is fully exonerated of any criminal liability (745 ILCS 10/2-302); and

WHEREAS, the amendment to Section 2-302 (745 ILCS 10/2-302) is scheduled to take effect on January 1, 2017; and

WHEREAS, the City Council deems it necessary and appropriate to amend UCC §§ 2-171, 2-172, 2-173, 2-174, 2-175, and 2-176 and

to add a new Section 2-177 to the Urbana City Code to bring the City's ordinance concerning the legal defense and indemnification of City employees and elected and appoint officials (UCC §§ 2-171 et seq.) into compliance with the aforesaid newly-enacted state statute and to clarify that those legal defense and indemnification sections apply to elected and appointed city officials.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Urbana, Champaign County, Illinois, as follows:

Section 1.

Urbana City Code Chapter 2, "Administration", Article IX, "Legal Defense and Indemnification for City Employees and Officials", Sections 2-171, 2-172, 2-173, 2-174, 2-175, and 2-176 shall be and hereby are amended as follows with strike-through words representing language to be deleted and underlined words representing language to be added:

Sec. 2-171. - Purpose.

The purpose of this article is to provide for legal defense services and indemnity for employees and ~~commissioners and~~ elected and appointed officials of the City of Urbana who are sued or threatened with suit for damages allegedly caused by their actions in the performance of their duties as employees and elected and appointed officials. The intent is to provide legal defense services and indemnity to the fullest extent permitted by the home rule provisions of the Constitution of the State of Illinois and this article, even if such is inconsistent with state statutes.

Sec. 2-172. - Definitions.

~~Commissioners as used in this article means the member(s) appointed by action of the city to a board or commission created pursuant to statute or ordinance of the city. It shall also include the Boneyard commissioner and the person appointed to the Champaign County Housing Development Corporation Board. It shall also include the estate or personal representative of the estate of a deceased commissioner.~~

Appointed officials as used in this article means individuals who are appointed by the mayor, with the advice and consent of the city council, to serve on one or more boards, commissions, and task forces formed by the city. It shall also include the estate or personal representative of the estate of a deceased appointed official.

Defendant as used in this article means ~~the~~ a city employee, ~~commissioner~~ or elected or appointed official sued or threatened with suit as appropriate to the context.

Elected officials as used ~~herein~~ in this article means the mayor, alderpersons, and the city clerk, even if such person was appointed to fill out an unexpired term. It shall also include the estate or personal representative of the estate of a deceased elected official.

Employee as used in this article means all persons who are employees of the city other than elected officials and includes employees who have concluded employment with the city. It shall also include the estate or personal representative of the estate of a deceased employee.

Indemnity as used in this article means to pay on behalf of a defendant ~~the employee, commissioner or elected official~~ part or all of a judgment based on such claim, action or proceeding or to reimburse the defendant ~~employee, commissioner or elected official~~ for all or part of any compromise or settlement of such claim, action or proceeding.

Legal defense services as used in this article means undertaking legal representation of the ~~person~~ defendant sued (or threatened with suit) by the city attorney or other counsel expressly authorized by the city attorney to appear and defend against the claim, action or proceeding, or reimbursement of the ~~defendant~~ employee, commissioner or elected official for part or all of his or her court costs and attorney's fees incurred in the defense of such claim, action or proceeding. ~~Such reimbursement may include part or all of the cost of~~

~~defense against a claim of willful and wanton conduct whether undertaken voluntarily or in accordance with subsection 2-173(d) below.~~

Reservation of rights agreement means an agreement between the city and the employee that provides for legal defense of the employee while reserving the rights of the city not to pay the judgment, compromise or settlement until it is established that the injury complained of arose out of an act or omission relating to the employee's duties and was not willful and wanton.

Sec. 2-173. - Employees and commissioners.

(a) *General-Duty to defend.* If a claim, action, or proceeding which is civil in nature is filed against a defendant ~~an employee~~ for damages allegedly arising out of the actions or omissions of such defendant employee relating to his/her duties as an employee or elected or appointed official of the city, (regardless of whether such is alleged to be in his or her official or individual capacity, or both) unless the city attorney declines to appear and defend (or withdraws) on the basis that the employee-defendant was guilty of intentional, willful, or wanton, or grossly negligent misconduct or despite the allegations, the actions or omissions complained of were not relating to his/her duties as an employee or elected or appointed official (see subsection (d) below), the city shall provide the defendant employees legal defense services and/or indemnity, to the extent determined by the city. Nothing herein shall preclude the city from undertaking such defense under a reservation of rights.

In the event the city maintains any action or claim against a defendantn employee, commissioner or elected official, whether as plaintiff, claimant, cross-plaintiff, or counter-plaintiff, petitioner or otherwise, no legal defense services or indemnity will be provided to, for or on behalf of the defendant.

(b) *Separate attorney when conflict of interest.* Upon receipt of a declination to defend on the basis of potential or actual conflict of interests or upon withdrawal by the city attorney on the basis of an

actual or potential conflict of interest, the defendant~~employee~~ may employ his/her own attorney to appear and defend, in which event, if, but for the conflict of interest only, the city would defend, the city shall pay the defendant's~~employee's~~ court costs, litigation expenses and attorney's fees as they are incurred to the extent approved by the city attorney as reasonable.

(c) *Criteria for determining if conduct was related to duties.* In determining whether the conduct upon which the claim is based was related to or arose out of his/her—the defendant's duties as an employee or an elected or appointed official, the following shall be considered:

(1) Whether the conduct is the kind the defendant~~employee~~ is employed or charged to perform;

(2) Whether it occurred substantially within authorized time and space limits; and

(3) Whether it was motivated, at least in part, by a purpose to serve the city.

(d) Not related to duties/willful misconduct.

(1) In the event that the city attorney determines that the act or omission upon which the civil claim or action is based was not related to the defendant's~~employee's~~ duties or was intentional, willful, or—wanton, or grossly negligent misconduct, or that the defendant personally derived a financial benefit or gain unlawfully, the city shall have no duty to provide defense services or indemnify unless a jury or court expressly finds that the act or omission of the defendant~~employee~~ was related to his/her duties as an employee and was not intentional, willful, or—wanton, or grossly negligent misconduct or intended to provide an unlawful financial benefit or gain for the defendant or another person, in which case the city shall indemnify the defendant~~employee~~ for any damages awarded, and court costs and attorney's fees assessed as part of any final and unreversed

judgment. In such event, the city shall also pay the defendant's court costs, litigation expenses, and attorney's fees which are not assessed as part of any final and unreversed judgment, to the extent approved by the city attorney as reasonable charges and reasonably related to proper representation of the defendant.

In all cases the defendant~~employee~~ shall cooperate in good faith to have special interrogatories and/or jury instructions submitted to the court or jury to determine whether the conduct or inaction which gave rise to the claim or cause of action: (1) was or was not intentional, willful, ~~or~~ wanton, or grossly negligent misconduct or did not provide the defendant with an unlawful financial benefit or gain, and (2) was or was not intended to serve or benefit the interests of the city.

(2) The city may elect to defend the defendant~~employee~~ under a reservation of rights agreement. If the city so elects and if the defendant~~employee~~ enters into a reservation of rights agreement, the city shall pay the judgment, compromise or settlement only if it is expressly established that the injury arose out of an act or omission relating to the defendant's~~employee's~~ duties as an employee or elected or appointed official and was not intentional, willful, and wanton, or grossly negligent.

(e) *Effect of other proceedings.* The termination of any action, suit, or proceeding by judgment or settlement, conviction, or in a plea of nolo contendere, or its equivalent, shall not, of itself, create a presumption that the act giving rise to the claim did not arise out of actions or omissions of such defendant~~employee~~ relating to his/her duties as an employee or elected or appointed official of the city.

(f) *Settlement.*

(1) In any settlement, if the city attorney determines that the conduct or inaction which gave rise to the civil claim or cause of action was

intentional, willful, ~~or~~ wanton, or grossly negligent misconduct, provided an unlawful financial benefit or gain for th defendant, or was not intended to serve or benefit the interests of the city, the city shall not indemnify the ~~defendant~~employee for any damages, court costs, or attorney's fees agreed to as part of the settlement. Otherwise the case may be settled, in the city attorney's discretion and with the ~~defendant's~~employee's consent and the city shall indemnify the ~~defendant~~employee for any damages, court costs, and attorney's fees agreed to as part of the settlement, or shall pay such settlement directly. Where the ~~defendant~~employee is represented by private counsel due to the city attorney declining to defend on the basis of an actual or potential conflict of interests, the city attorney shall be informed in writing of all settlement offers. The city attorney and the court having jurisdiction must approve any settlement in order to obligate the city to indemnify the ~~defendant~~employee.

(2) If, in the city attorney's sole discretion, the city attorney determines that a settlement offer is reasonable and the city agrees in writing that it would fund such settlement, and the ~~defendant~~employee refuses to settle, the city will continue to defend and/or indemnify the ~~defendant~~employee; however, the extent of the city's liability for indemnity will then be limited to the amount of such settlement offer which the city would have accepted. Where the ~~defendant~~employee is represented by private counsel due to the city attorney declining to defend on the basis of an actual or potential conflict of interest, the extent of the city's liability for indemnity will be limited to the amount of the settlement offer which the city indicated in writing it would accept, plus reasonable attorney fees incurred as of the date the city agreed in writing to the proposed settlement.

(g) *Determination of coverage.*

(1) If the city attorney determines that a defendantan—employee does not come within the provisions of this article, and thus fails or refuses to provide a defendantan—employee with a defense, and a court of competent jurisdiction later expressly determines that such claim should have been determined to be within the provisions of this article, then the city shall pay any judgment rendered against the defendantemployee and reasonable costs and fees incurred in obtaining the determination that such claim is covered by the provisions of this article. Nothing in this article shall be construed to deprive a defendantan employee of the right to petition a court of competent jurisdiction to compel the city to perform the duties imposed by this article.

(2) If the city attorney determines that a claim against a defendantan—employee comes within the provisions of this article, and if a court of competent jurisdiction later finds that such claim does not come within the provisions of this article, the city may seek reimbursement for any payments made by the city or on its behalf for part or all of any judgment and costs or fees incurred by or on behalf of the defendant's employee's defense as well as for that part or all of the costs or expenses incurred in obtaining the determination that such claim is not covered by this article.

Sec. 2-174. - Elected and appointed officials—and commissioners.

(a) If an elected or appointed official or commissioner is sued or threatened with suit for damages allegedly caused by their actions, the city may provide legal defense service and/or indemnity, if the elected or appointed official or commissioner acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the city, provided no such legal defense service or indemnification shall be provided with respect to any claim, issue or matter as to which such person has been adjudged to be liable to the city unless, and only to

the extent the court in which such action was brought, shall determine upon application that, despite the adjudication of liability, and in view of all the circumstances, such person is fairly and reasonably entitled to indemnity for such expenses as the court shall deem proper.

The termination of any action, suit or proceeding by judgment or settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption:

(1) That the person did not act in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the city; and

(2) That with respect to any criminal action or proceeding, the person had reasonable cause to believe that his or her conduct was unlawful.

(b) The city may provide legal defense service and/or indemnity as set forth in subsection 2-174(a) to persons who formerly served as mayor, city clerk, alderperson or ~~commissioner~~ as an appointed official if the basis of the claim or charge against such person arises out of such person's duties as an elected or appointed official of the city.

(c) Whether or not, and the extent to which, if any, the city shall provide legal defense services and/or indemnification as set forth in subsection 2-174(a), shall be only as authorized in the specific case by a majority vote of alderpersons then holding office who are or were not parties to such suit or action or, if there are less than three such disinterested alderpersons, by the city attorney.

Sec. 2-175. - Matters common to all defendants.

(a) *Determinations under this article.* Unless specifically reserved to the city council, all determinations to be made by the city in administering this article shall be made by the city attorney.

(b) *Conflict of Interest.*

(1) In the event the city attorney determines that for the city to represent a defendant would place the city and the party defended in an actual or potential conflict of interest the city attorney shall promptly decline in writing to appear and defend or shall take appropriate action to withdraw as attorney for such party.

(c) *Continuing review.* The decision to provide or not provide defense services or indemnify may be reviewed and modified at any time when the interests of justice require, and legal defense services or payment therefore, even retroactively, may be authorized as well as indemnity.

(d) *Duty of defendant to notify city.* It is the obligation of the defendant to request in writing within fourteen (14) days after service of a claim, demand, notice, summons or other process upon the defendant that the city provide for defense. Such written request shall be filed together with the claim, demand, notice, summons, or other process with the city clerk and the city attorney. The city, at its sole discretion, may provide a defense for those who fail to make a timely request.

(e) *Cross complaints and counterclaims.* For the purposes of this article, the city's duty and authority to defend and indemnify a defendant shall extend to a cross-complaint or counterclaim against such defendant, if in the determination of the city attorney, the cross-complaint or counterclaim meets the requirements as set forth for defense if such were contained in an original complaint, and notice is given as set forth in subsection 2-175(d). If the defendant wants to file a counterclaim or cross complaint in any legal proceeding covered by this article, the city reserves the right to separate the costs of defense from the costs associated with presentation of counterclaim or cross complaint. If the city exercises its right to separate such costs the defendant shall be liable for all costs associated with the presentation of the counterclaim or cross complaint.

(f) *Control of litigation.* Whenever the city provides for the defense of any action set forth in this article, as a condition of such defense, the city may assume exclusive control over the representation of such defendant, provided, however, that any defendant may at any time, at the option of the defendant, take control over representation by waiving all rights to all or part of indemnification and rights to payment for costs of defense.

(g) *Insurance.* If any insurance policy provides coverage of the defendant for the allegations made, the city's obligation to pay for legal representation, settlement, judgment, or costs or fees, shall be secondary to such insurance, and the city's obligation to defend and/or indemnify will not begin until the limits of all such insurance policies are exhausted. Nothing contained in this article shall be construed to modify or amend any provisions of any insurance policy in which a defendant is a named insured.

(h) *Non-cooperation.* In the event that a defendant fails or refuses to comply with any of the conditions of this article or fails or ceases to cooperate in good faith, then all the provisions of this article shall be inapplicable and have no force or effect with respect to any such claim or litigation from the time such failure to cooperate first occurs.

If a defendant fails or ceases to cooperate in good faith, but later resumes cooperation in good faith, the city attorney may reinstate the benefits of this article as to such defendant as the city attorney deems appropriate. Failure to cooperate in good faith implies the conscious doing of wrong or actions taken for a dishonest purpose. It involves the actual or constructive fraud or design to mislead or deceive the city, or neglect or refusal to fulfill a duty not prompted by an honest mistake as to one's rights or duties.

(i) *City can employ independent counsel.* The city may provide for the defense of a defendant pursuant to this article by employing independent counsel for this purpose or by asserting the city's right under any

appropriate insurance policy which requires the insurer to provide the defense.

(j) *Labor contract.* If a labor union contract covers any of the provisions of this article, all ~~defendant~~employees under such contract shall be governed by the provisions thereof rather than the provisions of this article and if any conflict exists between the provisions of this article and the provisions of any such contract, the contract shall control.

(k) *Punitive or exemplary damages.* The city is authorized to pay that part of a judgment that is for punitive or exemplary damages if the city council finds all of the following:

(1) The court judgment is based on an act or omission of ~~a defendant~~an employee acting in a manner that was related to or arose out of his/her duties as an employee or elected or appointed official; and

(2) That at the time of the act or omission giving rise to the liability, the ~~defendant~~employee acted or failed to act, in good faith, and without actual malice, and in the apparent best interests of the city; and

(3) Payment of the claim or judgment would be in the best interests of the city.

(1) *No modification of immunity or liability intended.* Nothing in this article shall be construed as abrogating or waiving any limitation of liability or immunity presently or hereinafter made applicable to the city or its defendant which would otherwise be applicable to any action or proceeding to which this article would apply.

Sec. 2-176. - Indemnification authorization and limitations.

Notwithstanding anything stated herein limiting indemnification or legal defense services, if it feels justice would be served, the city council may elect

nevertheless to authorize indemnification or legal defense services if under all circumstances considered, the city council determines such would be fair and reasonable.

Section 2.

Urbana City Code Chapter 2, "Administration", Article IX, "Legal Defense and Indemnification for City Employees and Officials", shall be and hereby is amended to add the following new Section:

Sec. 2-177. - Bar against providing defense and indemnity in criminal proceedings.

(a) The city shall have no obligation whatsoever to indemnify, defend, or pay or reimburse for the cost of defense of or to pay any judgment, verdict, decree, or order for or on behalf of any city employee who is a defendant in any criminal action arising out of or incidental to the performance of his or her duties unless such employee is fully and wholly exonerated of all criminal actions and charges brought against the employee. The city may reimburse the employee for reasonable defense costs only if the criminal action was instituted against the employee based upon an act or omission of that employee arising out of and directly related to the lawful exercise of his or her official duties or under color of his or her authority and such action or charges are fully, completely and finally resolved in favor of the employee. Nothing herein shall be interpreted or construed as prohibiting the city from providing defense or paying or reimbursing for the cost of defense of an employee who is called or to be called as a witness in any criminal proceeding and who so testifies in such proceeding.

(b) The city shall have no obligation whatsoever to indemnify, defend or pay or reimburse the cost of defense of any city employee who is a defendant in any criminal or civil action arising out of conduct unrelated to the performance of that employee's duties unless a court expressly determines in writing that the conduct in fact related to the performance of that employee's duties.

(c) The city shall have no obligation whatsoever to indemnify, defend or pay or reimburse the cost of defense of or pay or reimburse for any judgment or decree entered against an employee where such judgment, verdict or decree includes, in whole or in part, punitive or exemplary damages, fines or penalties.

Section 3.

Those sections, paragraphs, and provisions of the Urbana City Code that are not expressly amended or repealed by this Ordinance are hereby re-enacted, and it is expressly declared to be the intention of this Ordinance not to repeal or amend any portions of the Urbana City Code other than those expressly set forth as amended or repealed in this Ordinance. The invalidity of any section or provision of this Ordinance hereby passed and approved shall not invalidate other sections or provisions thereof.

Section 4.

This Ordinance shall not be construed to affect any suit or proceeding pending in any court, or any rights acquired, or a liability incurred, or any cause or causes of action acquired or existing prior to the effective date of this Ordinance; nor shall any right or remedy of any character be lost, impaired, or affected by this Ordinance.

Section 5.

The City Clerk is directed to publish this Ordinance in pamphlet form by authority of the corporate authorities, and this Ordinance shall be in full force and effect from and after its passage and publication in accordance with Section 1-2-4 of the Illinois Municipal Code.

This Ordinance is hereby passed by the affirmative vote, the "ayes" and "nays" being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

PASSED BY THE CITY COUNCIL this ____ day of _____, _____.

AYES:

NAYS:

ABSENT:

ABSTAINED:

Phyllis D. Clark, City Clerk
APPROVED BY THE MAYOR this ____ day of _____, _____.

Laurel Lunt Prussing, Mayor