**OVERVIEW OF COMMON FISCAL COURT SUBSTANTIVE AND PROCEDURAL MATTERS**

Prepared by: County Attorney, Sam Clymer

Revised: December 2018

To assist incoming fiscal court members in transition into their new roles, and as a refresher to veteran members, the present document has been prepared to address some of the common and recurrent issues that touch on fiscal court operations.

**1. Nature of Fiscal Court - Duties and Powers.**

A fiscal court is an executive board with both legislative and ministerial powers that exists as a means to carryout the governmental functions necessary to the operation of a county. KRS 67.080; KRS 67.083; OAG 79-345. In performing its executive functions, a fiscal court is expressly limited to those functions that are specifically authorized by statute. KRS 67.080(3).

The specific powers of a fiscal court are set forth in KRS sections 67.080 and 67.083. The enumerated powers are too many to individually discuss herein but the core general powers are the regulation and control of the fiscal affairs of the county and the carrying out of all corporate governmental powers of the county necessary to its operation. KRS 67.080(c),(e),(g); KRS 67.083(3). Familiarity of these enumerated powers is critical and these sections should be reviewed in detail by court members individually. A fiscal court possesses the powers expressly granted by statute and those powers essential to the accomplishment of the objectives and purposes included within those expressly granted powers. OAG 79-345.

In order to lawfully carryout its powers and duties, a fiscal court must be lawfully convened and “in session” at a public meeting of the body and a fiscal court can only officially “speak” or take action through its orders. OAG 78-402. As such, for official action to be taken on behalf of the county, a motion must be made to consider and discuss an order effectuating the action and this order must be passed by majority vote.

**2. Powers and Duties of County Judge Executive.**

 *A. General Statutory Powers and Duties.*

KRS 67.710 provides that the JE shall be the chief executive officer of the county and shall have all the powers and perform all of the duties of an executive and administrative nature that are given by statute to the county itself and/or the fiscal court. KRS 67.710 further states that it the responsibility of the JE to properly administer the general affairs of the county.

That section goes on to delineate a list of a JE’s powers and duties but declares that the list is not exhaustive. Some of the key duties of a JE include the following:

* Execution of all ordinances and resolution of the FC;
* Execution of all contracts properly entered into by the FC;
* Inform the FC as to the operations of county offices, departments, boards and commissions;
* Keep the FC apprised of the financial condition and needs of the county;
* Appoint, supervise, suspend and remove county personnel with the approval of the FC.

 In relation to the appointment, suspension and removal of county personnel, there exists an exception to the requirement of FC approval of a JE’s action pertaining to the hiring and firing of a deputy JE, secretaries, assistants and clerical workers operating in the office of the JE. Pursuant to KRS 67.711, the JE is free to hire who he wants and they serve at the pleasure of the JE. However, the FC is required to set a salary for these persons pursuant to KRS 64.530(4).

In creating the role of JE, it was the intent of the legislature to empower an officer that is authorized to carryout the necessary executive and administrative functions necessary for the day-to-day operation of county government. As a practical example of this executive authority, the JE is authorized to individually consult with trigger the statutory services of the county attorney in relation to county business and legal interests. The other mechanism to trigger the statutory services of the county attorney would be through a collective request by the majority of the fiscal court at a properly convened meeting.

 *B. Powers and Duties In Fiscal Court Meetings.*

KRS 67.040(1) & (2) provide that a fiscal court shall consist of the JE and 3 elected county commissioners with the JE being the presiding officer. Both KRS 67.040 and Kentucky Constitution Sec. 144 make a JE a member of the fiscal court. As a member of the fiscal court, the JE has the right and duty to vote on all matters or questions coming before the fiscal court. OAG 78-52.

A unique statutory power of a JE is provided in KRS 67.040(3). This subsection states that if there is a tie vote of the fiscal court in the selection of any county officer or employee and that this deadlock continues for 15 days, then the JE shall have the deadlock entered into the FC minutes, including the reason for the deadlock, and the JE shall then have the authority to make the selection. This statute is to be strictly construed as allowing the JE to cast a tiebreaking vote only on the matter of ***selection*** of a county officer or employee, ***not the removal*** of one. OAG 78-353. Further, the particular situation delineated in KRS 67.040(3) is the only one in which the JE can cast a tiebreaking vote. OAG 78-293. In the event of a FC deadlock on any other issue, the motion is deemed to have failed for lack of passage by a majority vote. ***Id.***

**3. Powers and Duties of Deputy Judge Executive.**

KRS 67.711 states that a JE may appoint a deputy JE who shall serve at the pleasure of the JE. KRS 76.711(2) provides that a deputy JE may exercise all administrative powers, duties and responsibilities of the office of JE. OAG 82-145. It is important to note that the statutory grant of authority to a deputy JE identical to that of the JE is limited to administrative powers and duties of the JE. Executive and legislative powers of the JE are not included. This is made evident by the provision in KRS 67.711(2) that a deputy JE is not authorized to act on behalf of the JE as a member of or presiding officer of the fiscal court. While the JE is able to unilaterally hire, discipline and fire a deputy JE, the FC is required to set the rate of compensation for the deputy JE pursuant to KRS 64.530(4).

**4. Powers and Duties of County Commissioners.**

Pursuant to KRS 67.050 and 67.060, 3 CCs are elected by the voters of the entire county to represent the particular district in which they reside. The 3 CCs and the JE shall comprise the body of the FC. As discussed in section 1 above, the CCs, along with the JE, are the individuals statutorily empowered to exercise the general powers and take necessary action to regulate and control of the fiscal affairs of the county and the carrying out of all corporate governmental powers of the county necessary to its operation. KRS 67.080(c),(e),(g); KRS 67.083(3).

As important as the duties and powers of CCs are, it is equally important to know the ***limitations*** of the authority of CCs to act on behalf of the county. The Kentucky Atty. Gen. has held that the authority of CCs to act on behalf of the county is limited to actions taken in a properly convened meeting of the FC. OAG 78-402; OAG 78-592. OAG 78-402 stated that when CCs are gathered together properly in a meeting of the FC, they are *in business* for the county but when the meeting is adjourned and they begin to act as individuals outside of the meeting, they are *out of business.* OAG 78-529 put it directly by holding that “members of the fiscal court, outside of meetings of the fiscal court have no administrative or executive authority to act for the county as individuals.

Of course, certain executive and administrative actions must be carried out on a day-to-day basis on behalf of the county. To carry these actions out, the legislature passed KRS 67.710 making the JE the chief executive officer of the county and specifically delineated the executive and administrative duties and powers of that office. OAG 78-402; OAG 78-592. These day-to-day executive and administrative powers are exclusive to the JE as the legislature created no such powers on behalf of CCs. ***Id.***

It is critical to be aware of this limitation for liability purposes. As discussed in detail in the “Attorney-Client Relations and General Principles of Liability” document included, while CCs and JEs are shielded by ***sovereign immunity*** against state law claims brought against them in their ***official capacities***, such officials only have ***qualified immunity*** when state law claims are brought against them in their ***individual capacities***.

To reiterate, qualified immunity applies to alleged improper conduct of actions that are:

 1. Discretionary in nature = those involving discretion, personal deliberation, personal judgment. Not those requiring adherence to an established protocol or procedure.

 2. Performed in good faith = not willfully or maliciously done intending to violate the rights of an individual which the official knew or should have known existed.

 3. **Performed within the scope of the official’s authority**

* Herein lies the risk to CCs if a claim arises out of action taken or initiated on an individual basis on behalf of the county outside of a FC meeting. Such an action would not be protected by qualified immunity, thereby opening up a CC to personal liability.

**5. Conduct of Fiscal Court Meetings.**

*A. Open Meetings Act Requirements.*

The general rule as to FC meetings is contained in KRS 61.810(1). That section provides that “[a]ll meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times…”. Specific exceptions to the general open meetings of public agencies are delineated in KRS 61.810. The most frequently occurring exception s at FC meetings shall be addressed below.

 *B. Exceptions to Open Meetings Requirements “AKA” Executive Session.*

KRS 61.815 sets forth the necessary procedure prior to going into closed sessions as well as the limitations upon discussions therein. As to the necessary procedure prior to conducting closed sessions, KRS 61.815 mandates the following actions be taken:

 1. Notice must be given in a regular open meeting of the general nature of the business discussed in ES, the reason for the ES, and the specific exception in KRS 61.810 authorizing the closed session.

 KRS 61.815(1)(d) states that no matters may be discussed in ES other than those publically announced.

 KRS 61.815(1)(c) states that no final action may be taken in ES.

 2. Motion must be made in public session to go into ES and motion must be carried by majority vote.

KRS 61.815(2) gives latitude to FC as it relates to the rules stated in 1 and 2 above when the ES involves the following: discussions with business entities regarding a specific proposal wherein disclosure my jeopardize the project; attorney-client consultations for the provision of legal advice to the FC; and discussions of pending or proposed litigation.

In these circumstances, the FC must still announce the ES and cite the provision authorizing it but is not required to elaborate on the specific need for the ES or summarize the general nature of the business to be discussed. Further, the FC is authorized to discuss an array of matters falling within the topic of the need for ES and can make a final decision pertaining to the matter discussed.

 *C. Special Meetings “AKA” Workshops.*

Special meetings “AKA” workshops, can be held at times outside of the regular scheduled FC meetings. These meetings are subject to all requirements of the Open Meetings Act just as a regularly scheduled FC meeting is.

KRS 61.823(2) provides that the JE or a majority of the CCs may call a special FC meeting. KRS 61.823(3) mandates that the FC shall provide written notice of the special meeting specifying the date, time and location of the meeting, as well as the agenda. Discussions and actions taken in a special meeting shall be limited to the items listed on the agenda included with the notice.

KRS 61.823(4)(a) requires that the written notice referenced above shall be given to all members of the FC and all media outlets either personally, by fax, by U.S. mail or by email. That section further requires that this notice be sent so that it is received at least 24 hours prior to the special meeting. Lastly, KRS 61.823(4)(c) requires that the written notice of the special meeting must be conspicuously posted in the courthouse within 24 hours of the meeting.

 *D. Public Comment During Fiscal Court Meetings.*

In response to recent issues arising in relation to demands by members of the public to exercise their perceived right to address the FC during their meetings, I have drafted an extensive Memorandum Opinion regarding the permissibility of public comment in FC meetings in relation to individual rights created by the OMA and the First Amendment to the U.S. Constitution. The following is a summary of the key points in that document.

 (i) Public Comment In Light of the Kentucky Open Meetings Act.

The key section of the Open Meetings Act that is often argued to give rise to the right to participate/comment at public meetings is KRS 61.840. That section provides as follows:

“No condition other than those required for the maintenance of order shall apply to the attendance of any member of the public at any meeting of a public agency. No person may be required to identify himself in order to attend any such meeting. All agencies shall provide meeting room conditions which insofar as is feasible allow effective public observation of the public meetings. All agencies shall permit news media coverage, including but not limited to recording and broadcasting.”

Ky. Op. Atty. Gen. 11-OMD-020 addressed the issue of whether or not a fiscal court violated the Open Meetings Act by changing its public comment policy from one of open and unfettered access, to requiring the prior identification of the citizen and their desired topic of discussion prior to addressing the court. The Attorney General noted that neither KRS 61.840, nor any other provision of the Open Meetings Act, has been interpreted to vest the public with a right to participate, by means of public comment, in a fiscal court meeting.

Ky. Op. Atty. Gen. 11-OMD-020 went on to cite from a previous opinion on the subject that set forth the standard for interpreting the public’s statutory right regarding fiscal court meeting attendance as follows:

“While members of the public have the statutory right to attend all public meetings and to observe with their eyes and ears what transpires at those meetings, the Open Meetings Act does not grant those persons the right to participate in the meeting and address during the meeting the members of the public agency.”

The interest that citizens may have in being heard during a fiscal court meeting was certainly considered in the course of the Attorney General’s analysis. Ky. Op. Atty. Gen. 11-OMD-020 stated that while participation by public comment is strongly encouraged, it is not a right that can be enforced under the Open Meetings Act and therefor it stands to reason that imposing conditions on a nonexistent right to participate by addressing the members of the agency does not constitute a violation of the Open Meetings Act.

Because there is no right to address the FC created by the OMA, the FC is free to impose certain restrictions or conditions precedent to allowing public comment. Presently, the FC requires that any citizen desiring to comment publically in a FC meeting must contact the JE’s office and request to be placed on the agenda at the next meeting for public comment. This request must set forth with specificity the topic to be discussed. This request must be received prior to the 12:00 p.m. deadline on the Thursday immediately prior to the FC meeting so that the matter can be placed on the agenda for dissemination to the FC members.

It must be noted that Ky. Op. Atty. Gen. 11-OMD-020 stated that participation by public comment is not a right that can be enforced *under the Open Meetings Act.* For that reason, the validity of McCracken County’s public comment policy must also be analyzed under the provisions of the 1st Amendment’s protections of free speech as it is possible to attempt to challenge an alleged deprivation of one’s free speech rights via 42 U.S.C.A. sec. 1983 (the legal mechanism by which a citizen challenges a deprivation of a constitutional right under color of state/county authority).

 (ii). First Amendment Right to Free Speech.

The First Amendment prohibits the government from “abridging the freedom of speech”. ***Miller v. City of Cincinnati***, 622 F.3d 524 (6th Cir. 2010). Simply because a location is owned by the government however, does not mean that the property is open to all types of expressive activity at all times. ***Id.*** The state, no less than a private owner of property, has the power to preserve the property under its control for the use for which it is lawfully dedicated. ***Perry Educ. Assoc. v. Perry Local Educators’ Assoc.***, 460 U.S. 37 (1983).

Additionally, the fact that the intended audience members of one’s desired speech are government officials does not mean that one is inherently entitled to address the body. This matter was addressed in ***Minnesota State Bd. Of Community Colleges v. Minnesota Community College Faculty Assoc.***, 465 U.S. 271 (1984). The ***Minnesota*** court made clear that in the absence of some statutory mandate (such as a statute requiring a public hearing to be conducted prior to taking an official action) a citizen has no constitutional right to force the government to listen to their views because the constitution does not grant to members of the public a blanket right to be heard by public bodies. ***Id.*** at 283.

As shown above, the extent of one’s First Amendment right to free speech, and the associated ability for the government to place restrictions on the same, does not turn on the public nature of the venue nor the public nature of the intended audience. Rather, the analysis requires consideration of the following 3 questions on a case by case basis: (1) whether the speech is protected under the First Amendment; (2) what type of forum is at issue and, therefore, what constitutional standard applies; and (3) whether the restriction on speech in question satisfies the constitutional standard for the forum. ***S.H.A.R.K. v. Metro Parks Serving Summit County***, 499 F.3d 553 (6th Cir. 2007).

Without getting into a “forum analysis” under federal law, I will state that a FC meeting is properly characterized as a “limited public forum”. As such, the following pertains to the constitutional limitations that can be placed on speech within such a forum.

The Supreme Court has held that board meetings of public entities (such as a fiscal court) are limited public forums for discussions of subjects related only to the operation of the entity. ***Featherstone v. Columbus City School Dist. Bd. Of Ed.***, 92 Fed. Appx. 279 (6th Cir. 2004). Further, a government board may confine its meeting to a specified subject matter and may restrict public speech so long as the restrictions do not discriminate against speech on the basis of viewpoint and are reasonable in light of the purpose served by the forum. ***Pleasant Grove v. Summum***, 555 U.S. 460 (2009).

As pointed out in the ***Minnesota*** case, a citizen has no blanket right to have an audience with the McCracken Fiscal Court during a meeting. Rather, one’s free speech rights depend on the First Amendment forum analysis. As a limited public forum, the McCracken County Fiscal court can limit any public discussion to subject matters related only to the operation of McCracken County Government. Further, the County’s present policy for being placed on the agenda for public comment during a meeting is a legitimate time, place and manner restriction on speech equally applicable to all citizens on a basis that does not discriminate based upon the citizen’s viewpoint. Lastly, this policy is a reasonable one in light of the fact that a fiscal court meeting is a mechanism for the orderly transaction of county business.

**Bottom Line = citizens have no right to be heard at a fiscal court meeting at all pursuant to the Kentucky Open Records Act. Therefore, the County’s policy regarding public comments at the fiscal court meeting is merely a procedural requirement touching upon a nonexistent right and cannot violate the Act. Secondly, as a limited public forum, the McCracken County Fiscal Court is free to place reasonable time, place or manner restrictions on the public’s right to comment so long as the restriction does not discriminate against speech based upon the viewpoint of the speaker. Accordingly, the present policy of McCracken County related to public comment is constitutional.**

 *(E). Action Taken by Ordinance v. Resolution v. Fiscal Court Order v. Executive Order.*

A FC is authorized to take action necessary to carryout its powers vested via KRS 67.080 and KRS 67.083. Whether this action is effectuated via ordinance, resolution or order, is dependent upon the nature of the action taken. Below is a discussion of the legal nature of ordinances, resolutions and orders as well as examples of when these different types of enabling mechanism may be used.

 (i). County Ordinance.

A county ordinance is the most formal method of carrying out a FC function. A county ordinance is defined by KRS 67.075(1) as an official written act of a fiscal court, the effect of which is general and lasting in nature and which is enforceable within the jurisdiction of the county; or a lawful appropriation of public funds. OAG 78-815 elaborated on the nature of a county ordinance, in comparison to a county resolution, by providing:

“An ordinance ordinarily provides a rule of conduct and is binding upon the community. They are declarations of a rule of conduct for the enforcement of a right or the creation of a duty. However, a resolution is something less formal than an ordinance, and generally speaking is a mere expression of the mind of the local legislative body concerning some matter coming within its official cognizance.”

The use of an ordinance to set forth a rule of conduct or establishment of a right enforceable within the county is specifically required in relation to the 26 topics identified in KRS 67.083(3)(a)-(z). Examples of ordinances regulating in these types of areas include the animal control ordinance, solid waste management ordinance, planning and zoning ordinance, alcoholic beverage control ordinance. The primary example of an ordinance being used to appropriate public funds is the yearly budget ordinance.

The passage of an ordinance requires significant statutory formalities that are not required in passing resolutions or orders. Specifically, the following form related and procedural requirement pertain to the passage of a county ordinance:

 1. Ordinances can relate to only one primary subject. KRS 67.076(3).

 2. Ordinances must contain a specifically worded enacting clause. KRS 67.076(4).

 3. Ordinances must be published in the newspaper of general circulation within the county (Paducah Sun) on at least 1 occasion and this publication must be not less than 7 days nor more than 21 days prior to the introduction, discussion and first reading of the ordinance. KRS 67.077(2); KRS 424.130(1)(b). The publication of the ordinance can be in summary form in compliance with KRS 67.075(2).

 4. Ordinances must be read on 2 separate occasions prior to passage but may be read by title and summary provided the summary complies with KRS 67.075(2).

 5. Ordinances may be amended after the first reading but prior to adoption so long as the amendments are proposed in writing and fully set out the intended amendment(s). KRS 67.077(1).

 6. A majority vote of the *complete* FC shall be required to pass an ordinance whereas other matters require only a majority of a *quorum* of the FC to pass.

 (ii). County Resolutions.

A resolution is more formal than a FC order, but less formal than an ordinance. A resolution is ordinarily ministerial and temporary in character and may be an expression of the intent or the position of the legislative body concerning some matter coming within its official authorities. ***City of Owensboro v. Bd. Of Trustees, City of Owensboro Employees Pension Fund***, 190 S.W.2d 1005 (Ky. App. 1945); OAG 78-815. Further, a resolution does not require the same statutory formalities as a ordinance condition prior to passage. OAG 81-409. KRS 67.076(1) provides that certain official actions by a FC, including but not limited to required approvals, may be taken by resolution.

A resolution will be a stand-alone written document that will ordinary cite the reasons the legislative body is expressing its intent or position on the subject. Passage of a resolution requires only a motion by a FC member during a public meeting and the majority vote of a quorum of the FC.

 (iii). Fiscal Court Orders.

FC orders are the least formal and most ordinary used means by which the FC conducts county business during FC meetings. Orders are generally succinct written statements reflecting the action taken by the court. Passage of an order requires only a motion by a FC member during a public meeting and the majority vote of a quorum of the FC. KRS 67.076(1) provides that certain official actions by a FC, including but not limited to required approvals, may be taken by order.

 (iv). Executive Orders.

An executive order is a formal document labeled as an executive order by which the JE takes some executive action, pursuant to some particular statutory power vested in him as JE. OAG 78-351. No particular form is required but such a document is adequate if it expresses clearly the stator action being taken, the specific statute authorizing the action, the subject matter and parties or officials involved, and the date it is to be effective. ***Id.*** Executive orders should be filed in the JE order book. ***Id.***

There is no specific or express statutory requirement that the County Clerk should maintain a JE executive order book. However, in consideration of the historical and statutory function of the county clerk as the custodian and recorder of county records in general, the overwhelming logic points to the county clerk as the proper person to keep a book of executive orders as that office is the place where the public would expect to find such orders. ***Id.***

As the JE is the official statutorily authorized by KRS 63.220(1) to fill vacancies in the county offices of sheriff, coroner, surveyor, county clerk, county attorney, jailer or constable, it is this executive action that will most commonly be seen being performed by executive order.

 **6. Setting the Compensation of County Officers, Employees, Deputies and Assistants.**

KRS 64.530 is a horribly written, highly complicated, and not easily understood statute that governs the setting by the FC of the compensation of county officers, employees, deputies and assistants. KRS 64.530(1) provides that the fiscal court of each county shall fix the reasonable compensation of every county officer and employee ***except*** the officers named in KRS 64.535. These officers are the JE, county clerk, jailer and sheriff. The compensation of these officials are set by the statutory formula set forth in KRS 64.5275.

Regarding county officers elected by popular vote, the monthly compensation of the officer and his deputies and assistants shall be fixed by the by the FC, consistent with the provisions of KRS 64.530(3). KRS 64.530(3) provides that the FC *may fix* the reasonable maximum amount that the officer may expend each year for expenses of his office and *shall fix annually* the reasonable maximum amount, including fringe benefits, which the officer may expend for his deputies and assistants, and allow the officer to determine the number to be hired and the individual compensation of each deputy and assistant.

As to the salaries of these officials and their deputies, the FC shall fix their monthly compensation amount not later than the first Monday in May in the year in which the officers are elected. KRS 64.530(4). The compensation of the officer so set shall not be changed during the term, but the compensation of his deputies and/or assistants may be reviewed and adjusted by the FC not later than the first Monday in May of any successive year upon the written request of the officer.

**NOTE**: despite the prohibition on ***changing*** the compensation of elected official stated above, a cost of living adjustment to their salaries based upon the purchasing power of the dollar as calculated by the consumer price index is permissible. Cost of living adjustments are not recognized as ***changes*** or ***increases*** to one’s salary but merely an ***adjustment*** to the previously set salary based upon the consumer price index. ***Allen v. McClendon***, 967 S.W.2d 1 (Ky. 1998).

The provisions above do not foreclose on the ability of an officer to acquire and disperse additional funding for the compensation of his deputies and assistants prior to an official allocation pursuant to the fiscal year’s budget. Provision is made for the circumstance in which an official finds it necessary to hire additional personnel to effectively carryout the duties of his office. In response to such scenario, KRS 68.290 specifically permits the transfer of money from 1 budget fund to another to provide for increases in county employment pursuant to KRS 64.530(3) i.e. when the official determines it necessary to hire additional personnel to carryout the duties of his office.

Of course, this transfer of funding (and therefore the hiring of the additional deputy/assistant at all) must be approved by the FC via written record, in order format, to show the nature of the personnel change and the need for the transfer of money. The only limitation under KRS 68.290 is that funds cannot be transferred from a sinking fund or a special fund created for a specific purpose until the purpose for which the fund was created is satisfied.

 Practical Breakdown of Salary Setting Rules:

* FC fixes the reasonable compensation for every county officer and employee except the JE, Co. Clerk, Jailer and Sheriff.
* FC fixes the reasonable maximum amount a county officer may expend each year for his office expenses.
* FC fixes the monthly compensation for county officers elected by popular vote no later than the 1st Monday in May in the year that the officer is elected. This compensation shall not be changed during his term except that adjustments not in excess of the CPI calculated COL increase are permitted.
* FC fixes annually the reasonable maximum amount, including fringe benefits, that a county officer can expend for his deputies and assistants but gives discretion to the county official in deciding how many to hire and what to pay each.
* The compensation of a county officials deputies and assistants can be reviewed and changed each year not later than the 1st Monday in May.

**7. Issues Related to “County Roads”.**

A recurring issue that FC members will deal with is requests from citizens for the county to fix problems with roads in the county. This can be tricky because the county is limited to taking action/spending public funds on “county roads”. The following addresses the distinction between “county road” and “public roads” that are present within a county as well as the legal requirements for accepting a road into the county road system and the removal of a road from the county road system.

 (*A). County Road v. Public Road*.

**County Road –** is a public road that has been accepted by the fiscal court of the county as a part of the county road system. County Roads include the necessary bridges, culverts, sluices, drains, ditches, waterways embankments or retaining walls. KRS 178.010(1)(b).

**Public Road –** is any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions by the general public for 5 consecutive years shall conclusively be presumed to be a public road. ***Sarver v. Allen County***, 582 S.W.2d 40 (1979)

In ***Sarver v. Allen County***, 582 S.W.2d 40 (1979), the supreme court of Kentucky held that though a road may be “public”, it is not necessarily a “county road”. The court went on to state as follows:

“The obvious reason for this particular distinction is, of course, a public policy against holding counties responsible for the upkeep of any and all highways and byways that chance to become “public” through the processes of dedication or prescription over which the counties have no choice or control. Therefore even if a road is a “public road” it is not necessarily a “county road” unless it has been accepted into the courty road system by a formal act of the fiscal court.”

***Id.*** at 43.

 *(B). Methods of Establishing/Accepting “County Roads”.*

**Establishing/Accepting by Petition –** KRS 178.080(1) states that any interested person/organization desiring the establishment of a “county road” may petition the fiscal court to do so. The court shall then appoint 2 viewers to examine the road, along with the county engineer, and the team shall prepare a written report of the advantages and disadvantages of accepting the road.

* KRS 178.080(3) states that if the fiscal court believes the interests of the general public may be furthered by accepting the road, then the court shall set a day for hearing from the petitioner and all interested parties prior to undertaking the acceptance pursuant to KRS 178.115.

**Fiscal Court’s Power to Accept –** KRS 178.115 states that *whenever* the fiscal court of any county deems it to be in the best interest of the county to open or accept a road as a county road, said fiscal court shall adopt a resolution setting forth the necessity for such action and the road will be deemed to have been accepted.

* By choosing the word “*whenever”* the legislature shows that this procedure is the method of acceptance as a result of a petition and the procedure of KRS 178.080(1) OR upon the fiscal court’s own initiative.

 *(C). Criteria for Determining Whether to Accept as “County Road”:*

**Best Interest of the County/Public as a Whole –** a fiscal court must determine that acceptance of a road is in the best interest of the county and the public as a whole. In ***Walker v. Lyon County Fiscal Court***, 425 S.W. 2d 730 (Ky. 1968), the court discussed this determination. “The public convenience must be consulted and the common will, represented by the fiscal court, must prevail over the individual advantages and wishes. The acceptance of a road depends not on the interest of an individual, but on the common good and public sentiment.”

* In OAG 83-267, the attorney general stated that in determining whether the general public will be served by an action, the fiscal courts may consider, but not be limited to, the following items:
1. the number of families living in the immediate area;
2. the availability of proper funding;
3. the potential traffic in the area;
4. the public convenience in terms of social and economic preservation;
5. the potential benefit to the public in general;
6. whether the action would be considered essentially public in nature.

 *(D). Fiscal Courts are Prohibited From Using Public Funds to Maintain/Improve Roads Not Accepted as “County Roads”.*

OAG 88-59 states that “as a basic rule, where the fiscal court has not by formal action accepted a particular road into the county road system, it has no authority to spend county money on it or maintain or improve it in any way.”

Pursuant to OAG 84-358, even if a fiscal court has previously maintained or improved a public road that was not formally accepted as a “county road”, the court is not obligated to continue that practice. The Attorney General found that because the court possessed no authority to maintain or improve the public road in the first place, the road could be abandoned without any formal action by the fiscal court.

 *(E). Discontinuance of a “County Road” and Terminate the Duty to Maintain.*

KRS 178.070 states that a fiscal court may discontinue any county road it has previously accepted into the county road system. To lawfully do so, the fiscal court must order the compliance and carrying out of the following steps:

 1. Notice must be published of the public hearing regarding the anticipated act via advertisement published at least 1 time not less than 7 days nor more than 21 days before the occurrence of the public hearing; and

 2. Notices must be placed at 3 prominent and visible public places within 1 mile of the road; and

 3. After posting the notices, the Fiscal Court shall appoint 2 viewers who have no vested interest in the discontinuance of the road to join with the county engineer and prepare a written report regarding what if any inconvenience would result from the discontinuance; and

 4. Conduct a public hearing wherein the aforesaid report and any other evidence shall be considered in determining whether discontinuance of the road would cause any inconvenience;

*If no inconvenience is found to exist, a fiscal court can order the road discontinued and removed from the county road system. At this time, the ongoing duty to maintain shall be extinguished.*

 (i). What Becomes of the Right of Way Upon Discontinuance Pursuant to 178.070?

Upon discontinuance and extinguishment of the County’s duty to maintain, the right of way shall become a “public road”. There is not an automatic reversionary interest to the previous owners of the land that the road was built on. KRS 178.116(4); ***Bailey v. Preserve Rural Roads of Madison County***, 394 S.W. 3d 350, 360 (Ky. 2011). Further, there is not an automatic reversionary interest to the County either because the only interest that a county is presumed to have in a county or public road is that of an easement for public use, not a fee. ***Hylton v. Belcher***, 290 S.W.2d 475 (1956).

However, pursuant to KRS 176.116(4), as well as the ***Bailey*** case cited above the right of way can revert back to the owners of the property it was built upon if all of the adjoining landowners file a joint petition with the fiscal court asking that the right of way to revert back to them. If one landowner owns the land on both sides of the road, then the entirety of the roadbed shall revert to that owner. If the land on either side of the roadbed is owned by separate owners, then each shall be given an interest up to the center line of the road. ***Hylton,*** 290 S.W.2d at 476.

(ii). Suggested Procedure for Discontinuance of a “County Road”.

When an interested person seeks the discontinuance of a “county road”, the following procedure should be followed:

 1. County receives a petition to discontinue a county road. Petition will likely be signed by all adjoining landowners if the landowners desire to have the roadbed revert back to them;

 2. Place notices of discontinuance at 3 prominent and visible places within 1 mile of road;

 3. Appoint 2 disinterested viewers to join with the County Engineer to prepare a report regarding public inconvenience caused by discontinuance;

 4. Advertise for the public hearing on discontinuance at least 1 time not less than 7 days nor more than 21 days before the hearing;

 5. Conduct a public hearing on discontinuance of the road so and consider the public inconvenience, if any, would result;

 6. If public inconvenience does not outweigh the benefit of discontinuing the road, order that the road be discontinued. This will make the road at issue become a public right of way.

 7. If there was a joint petition filed by all adjacent property owners asking that the right of way revert back to them, the court will so order.

**8. Disposition of Surplus County Owned Real and Personal Property.**

 *(A). Disposition of Surplus Property With Inherent Value.*

KRS 67.0802 governs the procedure for sale or other disposition of county property. KRS 67.0802(1) provides explicit authority for a county to sell or otherwise dispose of any of its real or personal property. However, before sale or disposition can take place, the county shall make a written determination setting forth and fully describing the following:

 1. The nature of the real or personal property;

 2. The intended use at the time of acquisition;

 3. The reasons why it is in the public interest to dispose of it; and

 4. The method of disposition to be used.

 KRS 67.0802(2).

The 4 ways by which surplus county property can be disposed of are as follows:

 1. Transferred, with or without compensation, to another governmental agency. Pursuant to KRS 58.010(3) a governmental agency means the Commonwealth of Kentucky acting by or through any department, instrumentality or agency thereof, or any county, city, agency, or instrumentality thereof, or any political subdivision of the Commonwealth. This definition is incredibly broad and will encompass most any conceived governmental actor or governmentally affiliated actor.

 2. Sold at public auction following publication of the auction in accordance with KRS 424.130(1)(b).

 3. Sold by electronic auction following publication of the auction, including the uniform resource link (URL) for the site of the electronic auction in accordance with KRS 424.130(1)(b).

 4. Sold by sealed bids in accordance with the procedure for sealed bids under KRS 45A.365(3) and (4).

 KRS 67.0802(3).

Regarding the above-referenced bidding procedures, if a county receives no bids for the property, the property may be disposed of, consistent with the public interest, in any manner deemed appropriate by the county. KRS 67.0802(4). In this circumstance, a written description of the property, the method of disposal, and the amount of compensation, if any, shall be made. ***Id.*** Further, the statute specifically states that any compensation resulting from the disposition of real or personal property shall be transferred to the general fund of the county. KRS 67.0802(5)

The disposition of surplus county property most often occurs in the context of a transfer of McCracken County property to another neighboring county. Because this is a transfer to another governmental agency, the transfer can be made with or without compensation to McCracken County.

To effectuate the transfer, there would be required a written finding of the 4 items required by KRS 67.0802(2) set forth above. Because we are dealing with tax payer funded property, the transfer itself should take place via court order recited at a public meeting. The facts supporting the transfer could be included in the order itself or contained in a separate document and incorporated by reference at the reading of the order at the public meeting.

 *(B). Disposition of Surplus Property Without Inherent Value.*

The procedure for disposition of property carrying a certain inherent value is clearly spelled out above and is intended to ensure that property obtained from taxpayer funds is sold for its highest and best value and/or put to use in a way that remains in the public’s best interest. However, these rules and the procedures mandated (along with their associated costs) make little sense when disposing of property that does not carry inherent monetary value. For that reason, it is my opinion that the forgoing statutes do not apply to the disposition of property with little to no inherent value. Because the surplus property disposition statutes do not address this type of property, and therefore do not apply to the same, guidance must be drawn from established common law procedures.

The Kentucky Attorney General has stated that if no provision is made by statute as to the procedure for disposing of surplus public property, then such matters are left to the reasonable discretion of the public body at issue. OAG 77-492; OAG 82-41. It has further been stated in opinions of the AG and in Kentucky Supreme Court cases that pursuant to KRS 67.080(1)(c), it is up to the fiscal court to regulate and control the fiscal affairs of a respective county and that implicit in this responsibility is the duty to use good business judgment and sound discretion in acting for the benefit of the public. ***Boyd County v. Boyd County Fiscal Court***, 56 S.W.2d 959 (Ky. 1933); OAG77-692.

The exercise of reasonable discretion, good business judgment, and sound discretion, would require that the county dispose of county property having very little to no inherent monetary value in a way that allowed the county to realize some modicum of financial gain or at least to not incur any expenses in disposal if possible. An example of this would be scrapping any recyclable items and finding the most cost effective way of discarding non-recyclable items.

**9. Authorized Use of Public Funds Relating to Private Recipients.**

FC members will face repeated requests from private groups seeking the county to contribute public funds in support of their organization. The following presents an analysis of the legal standards related to this topic.

 *(A). Section 179 of the Kentucky Constitution.*

In pertinent part, section 179 of the Kentucky Constitution, states as follows:

“The General Assembly shall not authorize any county, or subdivision thereof, city, town or incorporated district, to … appropriate money for … any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads or gravel roads…”

Throughout the years, this section of the Kentucky Constitution has been interpreted to have the primary purpose of prohibiting public funds, generated by state and local tax revenues, from being diverted from normal governmental channels and towards private usage. [[1]](#footnote-1)

The ultimate question becomes whether public monies are being diverted to impermissible private uses. Through case law and opinions of the Kentucky attorney general, it has been determined that the use of public monies is appropriate when such funds are used for a ***(1) public purpose*** and the respective county government retains a certain ***(2)*** ***connection and control*** over the funds appropriated.

 *(A). Public Purpose.*

The office of the attorney general has consistently taken the position that governmental appropriations must be for a “*public purpose*”. This axiom derives from the constitutional mandate that “taxes shall be levied and collected for public purposes only”.[[2]](#footnote-2)

When examining whether or not a purpose is a “public purpose”, the test is not who receives the money, but rather, the character of the use for which it is expended. As to the determination of the “public” nature of a use of funds, the Kentucky Supreme Court has held:

“It is not necessary that the whole body of the contributing public shall be directly the recipients of the benefits or advantages accruing from the establishment of the object in aid of which public funds may be set apart. It will be sufficient if it should be of such a character as that it promotes the general welfare and prosperity of the people who are taxed to sustain it.” [[3]](#footnote-3)

in OAG 99-5, as well as previously rendered AG opinions, the principals of *McQuillin Municipal Corporations* have been incorporated, including the following:

“Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all, or at least a substantial part of, the inhabitants or residents. Otherwise stated, the test of a public purpose should be whether the expenditure confers a direct benefit of a reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit.”

The forgoing authority gives rise to the following statement as to “public purpose”:

**Public Purpose = one that is intended to promote and contribute to the health, safety, welfare, prosperity and contentment of the members of the public through a widely applicable benefit.**

 *(B). Connection and Control.*

In addition to the requirement that public funds must be allocated in furtherance of a public purpose, such funds must also have a significant connection to the allocating governmental body and subject to the continued control of said body. Simply stated, a long line of AG opinions require that appropriations of public funds by governmental bodies be earmarked and used solely for the public purpose for which they were appropriated and that such funds be subject to budgeting documentation by the recipient and approval by the governmental entity. OAG 99-5.

Said authority gives rise to the following statement as to “connection and control”:

**Connection and Control** = Funds allocated to a recipient from a governmental entity must be earmarked for use solely in furtherance of the identified public purpose for which they were given. Such purpose of use must be documented by the recipient and subject to final approval by the governmental entity prior to use.

**Bottom Line** = **public funds cannot be allocated by a governmental entity to a private or quasi private entity unless such funds are given in furtherance of a “public purpose” that is intended to promote and contribute to the health, safety, welfare, prosperity and contentment of the general public through a widely applicable benefit AND said funds are earmarked for that reason, subject to the review and authorization of the governmental entity.**

**10. Attorney-Client Relationship Between the Fiscal Court and County Attorney.**

 *(A). Duties of the County Attorney.*

* Legal counsel to the Fiscal Court
* Legally advise Fiscal court and conduct the legal affairs of the Fiscal Court
* Legally advise the many McCracken County offices, officials, commissions and special districts and conduct the legal affairs of such bodies ***so long as not in conflict with the Fiscal Court***
* Attend Fiscal Court meetings
* Misdemeanor criminal prosecution
* Juvenile prosecution
* Child support enforcement
* Adult disability guardianship
* Involuntary drug and alcohol abuse treatment proceedings

Please know that with regard to the criminal prosecutorial duties of the CAO, I delegate those duties to my 6 assistants. This allows me to focus all of my attention on my civil duties as legal advisor to the county government.

**Bottom Line – I’m your attorney. I’m charged also with representing and advising the many other county offices and officials UNLESS their interests are in conflict with the Fiscal Court. If at anytime the legal interests of other county offices or officers become counter to the interests of the FC, I am required to abandon legal service to such parties in favor of the FC.**

 *(B). Attorney-Client Relationship with the Fiscal Court.*

As your attorney, we have a uniquely confidential relationship and our communications, both in person and via written formats, are protected by the attorney-client privilege.

**Purpose of the Atty-client privilege** – NOT to be secretive or nontransparent but to facilitate free and honest communications between a client and attorney to ensure that legal services are rendered in the most effective manner.

The attorney-client privilege is the oldest of the privileges known at common law and is statutorily governed by the provisions of KRE 503. ***Hahn v. University of Louisville***, 80 S.W.3d 771 (Ky. App. 2001). The attorney-client privilege has expressly been recognized to apply to public agencies by the ***Hahn*** court due to that court’s finding that sound legal advice and advocacy serve vital public purposes and that such advice and advocacy depend upon a guarantee of confidentiality between attorney and client. ***Id.*** citing ***Upjohn Co. v. United States***, 449 U.S. 383 (1981).

**KRE 503 Attorney-Client Privilege**

KRE 503 & 509 give rise to the atty-client privilege and make the privilege applicable to us.

 **Client –** a person, including a public officer, or any organization whether private or public, that is rendered professional legal services by a lawyer, or who consults a lawyer with a view toward obtaining professional legal services. YOU, THE FISCAL COURT

 **Lawyer -** a person authorized to practice law in any state or nation. ME

 **Confidential Communication –** communication not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services.

**General Rule =** a client has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of legal services.

 **HOWEVER –** the privilege is WAIVED if the client voluntarily discloses or consents to disclosure of any significant part of the privileged matter.

 *(C). Practical Applications of Atty-Client Privilege:*

1. **Consultations/memos –** any time the fiscal court asks me to consider a legal matter, the initial conversation as well as the final legal advice, be it oral or in written memo form, are privileged and will remain so until voluntarily disclosed by you.
2. **Executive Session –** Confidential discussions are allowed in executive session for discussion of proposed or pending litigation against or on behalf of the county (KRS 61.810(1)(c)) and meetings which state law specifically require to be conducted in private (KRS 61.810(1)(k)).

KRE 509 requires that atty-client communications remain confidential in order for the statutory privilege to attach. Therefore, general atty-client communications are lawfully discussed in executive session.

**Bottom Line = due to our atty-client relationship, any communications we have with respect to the rendition of legal advice or services OR in anticipation of legal advice or services are confidential UNLESS you choose to disclose them.**

**11. Principles of Liability Applying to Fiscal Court Members and the Legal Protections Afforded to Fiscal Court Members From Liability.**

 *(A). Principles of Liability.*

**2 Types of Allegations Giving Rise to Liability:**

1. Negligence
2. Violation of Constitutional Rights (42 U.S.C.A. § 1983)

 *(B). Government Officials and Officers’ Liability for Negligence.*

* Actions for negligence will seek money damages for things such as: negligent hiring, negligent supervision, negligent failure to train, failure to properly perform duties, negligent failure to perform required duties, etc…

**Negligence - Plaintiff Must Prove:**

1. County owed a duty of care to the plaintiff
2. County breached that duty of care
3. County’s breach of that duty resulted in injury to plaintiff

**Sovereign Immunity**

**Sovereign Immunity** is the absolute immunity that precludes the maintaining of any suit against the state. A county is a political subdivision of the Commonwealth of Kentucky and is considered an arm of the state. As such, the county has sovereign immunity.

**Sovereign Immunity Applies When:**

1. plaintiff sues McCracken County Under STATE LAW CLAIMS

1. plaintiff sues any McCracken County official in his/her “Official Capacity” because a suit against a public official in their official capacity is viewed as a suit against the public entity itself.

**Qualified Immunity**

When a public official is sued in his “Individual Capacity” he does not enjoy absolute sovereign immunity, but only **qualified immunity.**

**Qualified Immunity Applies to Negligent Performance of:**

1. **discretionary** acts or functions - those involving discretion, personal deliberation, judgement;
2. performed in **good faith –** NOT willfully or maliciously intending to violate the rights of an individual which the public official knew or should have known existed
3. within the scope of the employee’s authority.

**“Shifting Burden” –** once an official proves that the challenged act was performed within the scope of his discretionary authority, then the burden shifts to the plaintiff to prove that the discretionary act was not performed in good faith.

**Qualified Immunity DOES NOT APPLY to Negligent Performance of:**

* **Ministerial acts =**  acts that require only obedience to the orders of others or when the officer’s duty is absolute, certain and imperative involving merely execution of a specific act

**KRS Chapt 65.2003(b) Statutory Immunity From Tort Liability**

A local government (including officers and agents thereof) **SHALL NOT BE LIABLE** for injuries or losses resulting from:

1. Any claim by an employee of the local government which is covered by worker’s compensation;
2. Any claim in connection with the assessment or collection of taxes;
3. Any claim arising from the exercise of legislative or quasi-legislative functions or the judgment and discretion vested in the local government, which shall include but not be limited to:
4. Adoption or failure to adopt any ordinance, resolution, order, regulation or rule
5. Failure to enforce any law
6. The issuance, denial, suspension, revocation of or the failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;
7. The exercise of discretion when in the face of competing demands, the county determines whether and how to utilize or apply existing resources
8. Failure to make an inspection.

NOTE: statute specifies that nothing in this statute shall be construed to exempt liability for negligence arising out of acts or omissions of its employees in carrying out **ministerial** duties.

**Bottom Line = McCracken County is immune from tort liability and you are immune from tort liability when sued in your official capacity. When sued in your individual capacity, you are immune from tort liability so long as you were performing discretionary acts in good faith and such acts were within the scope of your authority.**

 *(C). Government Entity & Officials’ Liability for Constitutional Rights Violations.*

**42 U.S.C.A. § 1983 AKA “1983 Suits” –** not a source of substantive rights itself, just a way created to allow people to sue for violations of constitutional rights by an actor acting under state law.

* Typically involves the deprivation of **federally guaranteed rights** of life, liberty, property or any of the enumerated rights in the bill of rights by a state actor operating under color of state law.

**Limitation on Governmental/Municipal Liability**

A County’s liability in 1983 suits is limited to unconstitutional conduct that resulted as a product of a policy statement, ordinance, regulation, or decision officially adopted and practiced by governmental officers or which results from a custom of the governmental entity.

* Because the plaintiff must prove that the unconstitutional conduct was caused by a governmental policy or custom, a single incident of misconduct cannot be the basis for liability.

 **INCREDIBLY DIFFICULT TO PROVE!!!!**

**Municipal/Governmental Liability Limitation Applies When:**

1. plaintiff sues McCracken County

1. plaintiff sues any McCracken County official in his/her “Official Capacity” because a suit against a public official in their official capacity is viewed as a suit against the public entity itself.

**Qualified Immunity**

When a public official is sued in his “Individual Capacity” for violating a constitutional right, he is entitled to **qualified immunity.**

**Qualified Immunity for Constitutional Violations Applies when:**

**2 Tiered Analysis for Qualified Immunity**

1. P has burden of proving that D actions violated a constitutionally protected right. *If a violation is proven = move to step 2*

 2. Was the right that was violated one that is “clearly established” meaning that a reasonable county official would have known that his conduct was violative of the right?

* Additionally, a plaintiff must prove an official acted knowingly or intentionally to violate his constitutional rights. Mere negligent or reckless conduct is not enough.

**Bottom Line = When the County is sued or you are sued in your official capacity, a plaintiff must prove that an official acted knowingly or intentionally and pursuant to govt policy or custom to violate rights. When sued in your individual capacity, you are immune from tort liability so long as you were performing discretionary acts in good faith and such acts were within the scope of your authority.**

1. ***Louisville Municipal Housing Commn. v. Public Housing Admin.***, 261 S.W. 2d 286 (Ky. 1953). [↑](#footnote-ref-1)
2. ***Industrial Development Auth. V. Eastern Ky. Regional Planning Commission,*** 332 S.W.2d 274 (Ky. 1960). [↑](#footnote-ref-2)
3. ***Carman v. Hickman County,*** 215 S.W. 408 (Ky. 1919). [↑](#footnote-ref-3)