



## AGENDA ITEM

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**Meeting Name:** Town Council Meeting  
**Meeting Date:** July 23, 2025  
**Prepared By:** Diana Davis, Vice Mayor Pro Tem  
**Item Title:** Discussion on Legal Risks

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### **DISCUSSION: Governance Role in Legal Risk Evaluation**

#### **Purpose**

Clarify the respective roles of Town Council, Staff, and the Town Attorney in defining, evaluating, and acting on **legal risk**, specifically, whether this is a **policy matter for Council** or an **administrative matter for Staff**.

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### **Part A – Defining Roles and Responsibilities for legal risk evaluation**

#### **I. Key Governance Question**

##### **Who determines the Town's tolerance for legal risk?**

- Is it set by the **Town Council** as a policy decision?
  - Or is it determined by **Staff**, based on administrative interpretation of legal advice?
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#### **II. Guidance from the Town Charter**

- **Article III, Section 1(c):** *"The Town Council adopts policies and appropriates town funds... and its members have fiduciary responsibilities as trustees of public funds."*
  - **Article III, Section 7:** *"The Council shall appoint a Town Attorney and may employ other professional advisors."*
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### **III. Responsibility for Policy and Fiduciary Oversight Includes Legal Risk Management**

Town Council has budgetary authority. Legal risk often carries financial implications.

**What is legal risk?** In a general sense, legal risk is a spectrum of opportunity within a business decision. Any decision of the Town involves potential litigation risk, so we are always faced with the “yellow-light” of caution regarding potential lawsuit claims for any action taken. However, the Town Council may decide to move forward despite the quantified legal risks, if the public benefit rewards are sufficient to justify moving forward. **Town Council members as elected officials are uniquely accountable to the community on weighing the risk and rewards, and then selecting the options that create the most public policy benefits while mitigating against litigation risks with insurance or other risk mitigation practices.**

**Therefore:**

- Council must determine **how much risk is acceptable.**
- Council must ensure risks are **quantified, explained, and considered.**
- Staff and legal advisors must **not pre-empt the Council** by presenting legal risk as a reason to alter or override policy decisions.

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#### **IV. Principles of Good Governance**

<b>Function</b>	<b>Responsible Party</b>	<b>Explanation</b>
<b>Policy Setting</b>	Town Council	Council, as the legislative body, determines public policy benefits in weighing legal risk tolerance.
<b>Legal Advising</b>	Town Attorney	Provides legal analysis and risk evaluation; does not dictate outcomes.
<b>Policy Execution</b>	Town Staff	Implements Council policy; does not substitute its judgment for that of Council.

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#### **V. Proper Process for Legal Risk Evaluation – given that legal risk is not a mandate. It is a policy consideration that needs to be weighed against the public benefits.**

**Council’s role:**

- Receive **objective legal analysis** from the Town Attorney for the interpretation of likelihood of a claim being filed, arguments that would be presented by both sides regarding the likelihood of success on the merits if a claim is brought.
- Review **relevant factual data**, including:
  - Prevalence and outcomes of similar cases

- Potential costs and insurance coverage
  - Risk exposure and mitigation options
  - Weigh litigation risk **against public policy objectives**.
  - Decide whether to proceed—even when legal exposure exists.
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## VI. Recent Example: Agenda Item #13 – May 28, 2025 Council Meeting

### Summary:

A staff memo advised against continuing to apply **Ordinance 780** (harmony standards) to single-family homes, citing legal risk under the **Bert Harris Act**.

### Concerns:

- The memo presented legal risk as **conclusive**, not advisory.
  - **No new case law** or facts were provided to support the change to existing policy and existing Council direction. Bert Harris Act gives a 90-day settlement period.
  - Staff's position **contradicted prior Council direction** from the workshop.
  - Council ultimately voted to follow the memo, **despite a Town Council vote to retain Ordinance 780 at the same meeting**—resulting in conflicting actions without clarification.
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## VIII. Summary Statement

Legal risk evaluation is a **governance issue**, not just a legal or administrative one.

Council is the policymaking body elected to weigh legal, financial, and public policy considerations.

Staff and the Town Attorney are key advisors—but final decisions, including legal risk tolerance, belong to the Council who are responsible to the public through elections.

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## Part B – Action Plan to Implement Recommendations regarding legal risk analysis to Strengthen Governance and Clarify Roles

### 1. Clarify Roles and Responsibilities

- If a proposed action is **clearly illegal**, staff must not proceed.
- However, when legal risk is **subject to policy judgment**, then staff should not unilaterally determine the acceptable risk level or deviate from Council direction—even workshop consensus—without first **bringing the matter to the full Council** for discussion. **Staff**

**memos that make conclusions regarding legal risk of various policies without first getting direction from Town Council, can increase legal risk to the Town and limit the Council's options to achieve particular public policy goals.**

## **2. Direct the Town Attorney to Report Directly to the Town Council**

- Legal advice related to **the Council-adopted policy** should be provided **directly to the Town Council**, with staff included as appropriate—not the reverse.
- When staff consults the Town Attorney, **Council should be copied** on both the inquiry and the response, ensuring transparency and shared understanding.
- If the issue is significant, Council may then formally request a comprehensive legal opinion for proper deliberation, including the facts necessary for analysis of the risk identified.

## **3. Request a Motion to “Affirm Council's Role as Policy-Maker responsible for determining legal risk tolerance.”**

- Council should **restate in writing** that decisions involving **legal risk tolerance** are **policy decisions** reserved for the Council.
- Administrative staff shall:
  - Develop implementation procedures that align with adopted policy.
  - Not alter or delay implementation based on legal risk **without explicit Council direction**.

## **4. Prohibit Use of Staff Memos to Change or Set Policy**

- Staff memoranda should **not be used to revise or nullify adopted policy**, particularly where legal risk is cited.
- Any policy change or reconsideration must follow a **formal Council discussion and vote**.

## **Conclusion**

These actions will:

- Reinforce the **governance authority of the Council**.
- Ensure **legal advice is shared equitably and transparently**.
- Prevent inadvertent **policy shifts driven by staff interpretation**.
- Maintain the **integrity of the policymaking process**

**Part C – Example of what may be included within legal risk analysis, example provided analysis of state statute that pre-empts local governments from regulating building design materials with exceptions (i.e., Architectural Review for Single Family residential).**

**Attachment.**