

4

MAR 08 2012

ORDINANCE NO. 4351

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CHANDLER,
ARIZONA, AMENDING CHAPTER 5, CODE OF THE CITY OF CHANDLER,
RELATING TO RISK MANAGEMENT**

BE IT ORDAINED by the City Council of the City of Chandler, Arizona, that Chapter 5, Code of the City of Chandler, is amended as follows:

SECTION 1: That Chapter 5, Code of the City of Chandler is hereby amended to read as follows:

5-1. - Risk management program.

In order to establish a centralized and uniform administration of risk management including Loss Fund management, claims administration, administration of insurance contracts and provision of loss prevention activities there is hereby established the risk management program, under the supervision of the City Attorney.

5-2. - Risk Management Duties.

Under the supervision of the City Attorney, duties of risk management shall be carried out in accordance with the provisions of this chapter and shall be as follows:

- A. Claims and litigation administration.
- B. Evaluation of insurance needs and self-insurance abilities.
- C. Loss Fund management.
- D. Other services as determined by the City Attorney.

5-3. - Claims administration.

5-3.1. Filing claims. Claims must be made in compliance with Charter Section 5.03 and A.R.S. 12-821 et seq. and other applicable Arizona Statutes. All claims for damages shall be presented within one hundred eighty (180) days after the event, occurrence or transaction from which the damages allegedly arose, or within such shorter time as is otherwise required by law. The claim requirements contained in this section are intended to incorporate the requirements of A.R.S. § 12-821.01, and do not constitute a "binding or nonbinding dispute resolution process," "administrative claims process," or "review process" referred to in A.R.S. § 12-821.01(C)..

5-3.2. Agent for service. The City Clerk of the City of Chandler is hereby designated as the agent upon whom claims filed against the City or service of process in litigation may be served pursuant to A.R.S. Rules of Civil Procedure, Rule 4.1.

5-3.3. Claims processing. The City Attorney shall establish procedures to process, evaluate, investigate and report claims filed against the City. The City Attorney shall have the responsibility for the fiscal and administrative management of all claims against the City. The liability of the City for claims and claim

costs shall be that established by law..

5-3.4. Settlement. The City Attorney's office shall review and evaluate all claims received by the City.

- A. the City Attorney is authorized to pay up to twenty-five thousand dollars (\$25,000.00) in settlement of a claim against the City.
- B. All settlements in excess of \$25,000.00 shall require the prior approval of the City Council.

5-3.5. Litigation..

A. In the event that a legal action is filed against the City, the City Attorney shall determine whether to defend the litigation with the City Attorney Department or with outside counsel. Litigation strategy for claims referred to outside law firms for defense shall be the responsibility of the City Attorney. Retention of particular outside counsel shall be based upon their expertise, resources in the particular type of litigation involved and past performance.

B. Expenses, attorney fees and costs for such defense, whether by the City Attorney or outside counsel shall be charged to and paid from the Loss Fund by the City Attorney unless payment is prohibited in accordance with § 5-7.4.

5-3.5.1 Retention of Expert Witnesses, Consultants, Outside Attorneys. In furtherance of the purposes of this Chapter, the City Attorney may enter contracts for professional witnesses, consultants, attorneys or other experts to assist with an existing or probable judicial or administrative proceeding in which the city or a city employee is or may become a party. Such contracts shall be made in the best interests of the City but shall not be subject to the procurement rules of Chapter 3 of this Code.

5-3.6 City damages. The City Attorney is authorized to file such claims, counter-claims, third party claims or take other legal actions as may be necessary to seek subrogation and reimbursement or collect for damages sustained by City or where third parties are obligated to indemnify or reimburse the City for funds expended.

5-4. - Loss prevention and control programs.

The City Attorney may institute loss prevention and control programs based on loss experience and industry recognized standards.

5-4.1. All City Staff shall cooperate with the City's loss prevention, claims management and risk analysis efforts to minimize risk exposure. In addition, all City Staff shall cooperate as needed in the prosecution or defense of any legal action involving the City.

5-5. - Evaluation of insurance needs and self insurance abilities.

5-5.1. Self-insurance. The City shall act as a self-insurer for all claims and claim costs against the City other than those falling within the provisions of an insurance policy, surety bond or indemnity bond, or claims for which a person or entity other than the City is legally responsible. Provided, however that nothing in this section shall prohibit the City Attorney or designee from paying for the costs and fees necessary to legally establish that such insurance policy, surety bond, indemnity bond or other person or entity is legally responsible for any claim.

5-5.2. The City Attorney shall evaluate the self-insurance ability of the City and recommend to the City Council amounts for self-insurance (risk) retention and for excess insurance coverage.

5-6. - Risk management loss fund.

There is hereby established a risk management fund to be known as the "Loss Fund." The Loss Fund shall be administered by the City Attorney in conjunction with the Management Services Director and shall be considered the self-insured (risk) retention fund.

5-6.1. *Funds budgeted.* The Loss Fund shall be funded as part of the annual budgetary and appropriation process of the City in a sufficient amount to pay all reasonably anticipated lawful claims together with defense costs and expenses, uninsured property damage and losses, excess coverage and other insurance premiums and costs, and other related costs. The City Attorney shall recommend the amounts to be appropriated based on past experience, projected exposure to risk and costs and actuarial studies and projected risk analysis.

5-6.2. *Fund not subject to budget law.* Expenditures during the fiscal year from the Loss Fund and monies in the Loss Fund at the close of the fiscal year shall not be subject to the provisions of A.R.S. §§ 42-17101 et seq. An audit shall be performed annually by an external auditor, and said report shall be kept on file for a minimum of five (5) years.

5-6.3. *Payments from fund.* The Risk Manager shall pay from the Loss Fund the following costs, claims and expenses:

- A. Risk Management's operating expenses.
- B. Claims administration and adjusting costs.
- C. Defense costs including attorney fees and other litigation expenses and costs.
- D. Uninsured property loss and damages.
- E. Insurance premiums.
- F. Claims for which the City is liable and are not listed as exceptions herein below.

5-6.4. *Unfunded liability.* The following types of claims shall be managed by the City Attorney but shall not be paid from the Loss Fund. Funds to pay such claims when the City is legally liable shall be paid from the budget of the department from which the claim arose or appropriated from contingency funds by the City Council. Such unfunded claims are:

- A. Claims arising from eminent domain, condemnation or inverse condemnation.
- B. Claims arising from dedication, rights-of-way or easements.
- C. Claims arising from zoning or contract disputes except when the dispute involves insurance coverage or when the claim arises out of an employment related matter and in the judgment of the City Attorney would normally be within the coverage of a typical employment practices liability insurance provision.
- D. Claims arising from environmental impairment or regulatory actions related thereto, pollution, or any loss connected with hazardous wastes, no matter what the cause.

E. Asbestos related losses not involving workers' compensation statutes.

5-6.5. *Exceptions.* The City Attorney shall not pay the following types of claims.

A. Claims which are covered by a valid insurance policy.

B. Loss from City inventory and damages to City property that have customarily been repaired by City Employees.

5-6.6. *Loss fund restricted.* The monies in the Loss Fund shall not be expended for any other purpose but those listed herein.

5-6.7. *City Attorney decision final.* The determination by the City Attorney of whether the claim, cost or expense or any part thereof should be paid from the Loss Fund is final. Other departments may be charged by the City Attorney to reimburse the loss fund for all or portions of losses incurred by that Department.

5-6.8. *Annual report.* The City Attorney shall establish loss reporting procedures and shall periodically but no less than annually prepare and submit to the City Manager a report regarding the risk management program, including loss data of self-insured risks, premium and loss record of purchased insurance and the status of the risk loss fund . The City Attorney may obtain an independent audit of the loss fund as a component of the annual report. Such report shall also contain the City Attorney's recommendations regarding funding, operations and administration.

5-7. - Defense and indemnification of City Officers and Employees.

5-7.1. *City defense.* The City shall upon request defend and indemnify without charge, any present or former City Officer or Employee except as provided in section 5-8.5, against any civil claim, suit for damages, or other action against such employee asserted by any person or entity, which has or is alleged to have arisen from any act or omission of the employee if at the time of the act or omission the employee was acting within the scope of their employment and in good faith. However, such employee may retain his or her own counsel to assist in the defense at the sole expense of the employee.. The City also retains the right to associate with any insured in such defense as well as the right to choose the option of advancing expenses incurred in said defense or not. An employee or former employee must reasonably cooperate in good faith in defense of the claim or action to benefit from this section.

5-7.2. *Employee defined.* Employee means any past or present elected or appointed official, officer, employee or supervised volunteer, whether or not compensated or voluntary, who is authorized to perform any act or service on behalf of the City; except this shall not include an independent contractor, or independent professional advisor to the City Council, City Staff, any board, commission or other authority. Employees shall include members of boards, commissions or authorities which operate under the direct supervision and control of the City serving with or without pay, when acting in their capacity as elected or appointed officials as provided by this Code or the Charter of the City of Chandler.

5-7.3. Any City Employee who is held liable for the payment of any claims or damages, by way of judgment or settlement, shall be entitled to indemnification by the City for the amount of the judgment or settlement, where the act or omission resulting in such liability was done in good faith, without malice and within the employee's scope of employment and provided further that the employee participated in defense of the action with reasonable good faith and cooperation.

The City shall pay the judgment thereon or any compromise, settlement of claim or action to which the

City has agreed; however, the City may reserve the right not to pay any such judgment, compromise, settlement of claim or action until it is established that the injury, loss or damages from such judgment, compromise, settlement of claim or action arose out of an act or omission occurring within the scope of employment as an employee of the City. The City is required to pay the judgment, compromise, settlement of claim or action only if the injury, loss or damage arose out of an act or omission occurring within the scope of City employment.

5-7.4. Payment from risk management loss fund. Expenses for defense and indemnification under this section shall be paid from the Loss Fund, and shall include, without limitation, attorney's fees, expert witnesses, consultants, court costs and fees, judgments and amounts paid in settlement of a claim.

5-7.5. Exclusions. The City shall not defend, indemnify nor make any payment in connection with any claim or suit made against elected or appointed officials or employees under the following circumstances:

- A. Claims or punitive damages arising out of the willful or wanton misconduct.
- B. Claims arising out of acts of bad faith and/or fraud committed by or at the direction of an individual with affirmative dishonesty or actual intent to deceive or defraud.
- C. When the employee is charged in a criminal complaint or indictment unless the act or omission giving rise to the complaint or indictment was required by or authorized under the official's or employee's duties and responsibilities.
- D. Any claim filed by or on behalf of the City except such claims as may be filed by the City to recover money or other expenses for the Loss Fund.
- E. Any claim arising from the operation of a City vehicle without authority.
- F. Any claim for sexual abuse or harassment or immoral or sexual behavior whether caused by, instigated or directed by an employee.
- G. Provided, however, nothing in this section shall be interpreted to prevent the City from defending against any claim or lawsuit which makes allegations of conduct falling within this section when the City believes that the allegations are not substantiated.

5-7.6. Defenses not waived. Nothing in this subsection shall be construed to waive any defense or immunity available to the City or its employees in any action brought against the City or its employees..

5-7.7. Notice to City required. Any City Employee against whom a claim or action for damages is brought shall notify his/her immediate supervisor and the Risk Management services within the City Attorney's Office within five (5) working days after he/she becomes aware of such claim or action.

5-7.8. Determination by City Attorney. The City Attorney shall determine whether the provisions of this section apply to claims involving employees.

5-7.9. Joint defense. In the event that the City is or may be joined with one (1) or more City Employees as defendants in a lawsuit, the City and the employee shall be jointly represented by the same legal counsel, except that a separate legal counsel may be provided to the employee at the City's expense when it is determined by the City Attorney that joint representation would result in a violation of the rules of professional conduct or otherwise not be in the best interests of the City.

5-7.10. Conflict of interest.

A. Nothing in this subsection or any provision of this Code shall be construed to require the City Attorney to provide legal services in any manner which would result in a violation of the Rules of Professional Conduct by the City Attorney.

B. If the City Attorney determines that representation of a City Employee would violate the Rules of Professional Conduct or not be in the best interests of the City, the City Attorney shall notify the Employee and the City Manager of the same.

5-7.11. *Reimbursement by employee.* In the event, that the City incurs costs and expenses on behalf of an employee, pursuant to this section, and it is later determined that the employee was not entitled to the benefits of this section, then the City may seek reimbursement from the employee for all such costs and expenses, including attorneys' fees.

5-7.12. *City suit.* The City shall bring no legal action against an employee or former employee, who is or was employed to provide professional services to the City, for any loss, damage or injury to the City resulting from any act or omission by the employee in the scope of employment, unless the act or omission resulted from willful or wanton misconduct. "Professional services" are those services which are customarily provided by persons with specialized education and training, whose actions in the private sector are commonly protected by errors and omissions insurance (e.g. architects, accountants, attorneys and engineers).

5-8. City Attorney as Risk Manager. From and after the effective date of this Ordinance, the City Attorney shall assume the duties as the risk manager of the City. Any references to "Risk Manager" in this Chapter or any other Chapter in this Code shall be deemed to refer to the City Attorney.

INTRODUCED AND TENTATIVELY APPROVED by the City Council of the City of Chandler, Arizona, this _____ day of _____, 2012.

ATTEST:

CITY CLERK

MAYOR

PASSED AND ADOPTED by the City Council of the City of Chandler, Arizona this _____ day of _____, 2012.

ATTEST:

CITY CLERK
Approved as to form:

MAYOR

CITY ATTORNEY

CERTIFICATION

I HEREBY CERTIFY that the above and foregoing Ordinance No. 4351 was duly passed and adopted by the City Council of the City of Chandler, Arizona, at a regular meeting held on the ____ day of _____, 2012, and that a quorum was present thereat.

CITY CLERK

Published: