

RESOLUTION ADOPTING POLICY REGARDING SETTLEMENT OF TORT CLAIMS
AGAINST THE CITY OF GREENSBORO AND PARTIAL WAIVER OF
GOVERNMENTAL IMMUNITY

WHEREAS, the City of Greensboro has neither waived the defense or governmental immunity in certain tort cases through the purchase of liability insurance nor participated in a local government risk pool pursuant to N.C.G.S. § 160A-485(2000); but has purchased liability insurance which by its terms excludes claims to which governmental immunity is a complete bar and defense;

WHEREAS, the City Attorney has recommended that the City of Greensboro adopt a written Waiver Policy by which the decision to settle some tort claims, to which the defense of governmental immunity would otherwise apply, is determined and applied in a consistent manner as to all claimants to insure due process and equal protection pursuant to law;

WHEREAS, the City of Greensboro recognizes that notwithstanding the beneficial purpose of governmental immunity in allowing the City to conserve public funds which would otherwise be expended in lengthy negotiations and costly suits against the City, there are some claims to which the immunity might apply where it would be to the financial interest of the City to settle to avoid a costly defense and to promote the interest of fairness and equity for our citizens;

WHEREAS, the City of Greensboro recognizes that the services provided by the Police and Fire Departments involve reasonable and necessary actions that may cause harm and damage to persons and property that are not involved, in any way, in the course of the duties performed by the Police and Fire Departments;

WHEREAS, in an effort to promote the interest of fairness and equity for our citizens, the City of Greensboro seeks to provide limited financial assistance to those who are not involved and have been injured or to those whose property has been damaged in the course of the duties performed by the Police and Fire Departments;

WHEREAS, it is in the public interest to provide for the prompt investigation, disposition, compromise, and settlement of such claims without the delay occasioned by trial and extended negotiations, or the bringing of such matters before the City Council.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREENSBORO:

1. Except as specifically set out herein, it is the Policy of the City of Greensboro to assert the defense of governmental immunity as a complete bar and defense in all cases, based upon law and fact, in which it is applicable, and to pursue the defense, in addition to all other appropriate defenses, at all stages of the proceedings including the claim stage, and the trial and appeal stages, of any judicial, arbitration, mediation, administrative, or other procedure.

2. All negligence claims will be initially reviewed by the Office of the City Attorney to determine the applicability of the defense and bar of governmental immunity. If the

City Attorney's Office determines that the defense of governmental immunity applies to the claim this Waiver Policy will be in forced. If governmental immunity does not apply, the claim will be treated as any other liability claim.

3. The City retains the right to plead and interpose governmental immunity on unique claims, and cases of first impression, about which there are no clearly established precedents. No claim to which the City Attorney's Office deems governmental immunity applies, pursuant to law and facts, shall be otherwise settled by the City or an agent acting on behalf of the City.

4. If it is determined that, but for the defense of governmental immunity, the City would be liable for property damage, personal injury damages, or wrongful death to a claimant the defense shall be waived, only to the extent described in this Policy and only if the stated conditions in this Waiver Policy are met.

a. In making these determinations, the Office of the City Attorney, or specially retained legal counsel, or other settlement agent, shall consider conclusions, presumptions, and evidence such as, but not limited to: statements and observations of witnesses, statements and evaluations of the parties, oral and written reports (including investigative reports), affidavits, admissions, and any other facts and observations usually relied upon by claims adjusters or other persons usually charged with the duty to evaluate liability claims.

b. The injury or damage claim must be meritorious pursuant to established negligence law in North Carolina. Among other legal requirements the loss, damage or injury, must have resulted from the breach of a duty, to the injured party or deceased, on the part of a City employee. The injury must have been foreseeable, and solely, and proximately caused by a negligent act, or omission, of a City employee, or officer, who was at the time of the occurrence acting within the course and scope of her/his employment and which resulted in injury to the person or property of the claimant. The following conditions must also be met:

- i. There must have been no contributory negligence, to any degree, on behalf of the claimant, or his or her deceased, agent, guest, or tenant leading to the injury complained of;
- ii. The claim must not be time barred by any provision of law, including the limitation of action, laches, or statute of repose;
- iii. The claimant, or deceased, must not have otherwise been able to avoid the injury of which she/he complains;
- iv. No other defense arising from common law, such as (but not limited to) last clear chance or assumption of risk by court precedent, or statute must apply;
- v. There must be no other joint tortfeasors, contributors, or other parties, which are fully able to compensate the claimant for the loss, damage or injury;
- vi. The claim must not be based in whole, or in part, upon a subrogation, contribution, or indemnity claim of a third party;

- vii. No release, or covenant not to sue, shall have been, or shall be given to any third party, without the City's prior approval;
- viii. The damage, injury, or loss may not be claimed, or be, recoverable from insurance (including, but not limited to, underinsured and uninsured coverage) or any other collateral source; the claimant must voluntarily reveal all such sources;
- ix. The damage or loss must not be the result of any gross negligence, willful misconduct; or intentional, fraudulent, malicious, corrupt, criminal, or lascivious, act by an employee, public official or officer; nor, any act while such employee, public official or officer, was acting under the influence of drugs, or alcohol or was otherwise not in control of her, or his, mental or physical faculties.
- x. The injury, or loss, or damage was not the act of an independent contractor.
- xi. In the event a claimant is indebted, or becomes indebted, to the City, or the City has a claim, or counter claim, against the claimant such amount owed to the City, whether arising from the occurrence or accident, or otherwise, may be set off against the compensable damages payable to the claimant.

c. In the event a claimant is unwilling to settle her/his claim within the guidelines set forth in this policy or should any administrative, mediation, judicial, agency, or other involuntary process be instituted against the City or its employees or officers on behalf of the claimant, or any third party, based upon the occurrence giving rise to the injury, loss or damage, then this policy will not apply and the City shall raise the issue of governmental immunity along with any others it may have in the proceeding as a complete defense and bar to the claim.

5. If the defense and bar of governmental immunity is waived pursuant to this Policy it shall be waived only to the extent of allowing the following amounts of compensatory damages. The total sums of \$30,000.00 because of bodily injury, or death, of one person, in any one accident or occurrence; and subject to the said limit of \$30,000.00 for each person, the amount of \$60,000.00 because of bodily injury or death of two, or more, persons in any one accident or occurrence; and in the amount of \$25,000.00 because of injury to, or destruction of, tangible property in any one accident or occurrence.

6. If a claim arises out of the alleged acts of an employee of the City of Greensboro Fire or Police Departments, and if the City Attorney's Office determines that the employee is acting within the scope of his/her employment and that, regardless of the defense of governmental immunity, the facts of the claim do NOT impose liability upon the City, the City may reimburse the claimant for actual damages incurred to property or to person up to a maximum amount of TWO THOUSAND AND FIVE HUNDRED (\$2,500.00) DOLLARS.

a. In making these determinations, the Office of the City Attorney, or specially retained legal counsel, or other settlement agent, shall consider conclusions, presumptions, and evidence such as, but not limited to: statements and observations of witnesses, statements and evaluations of the parties, oral and written reports (including investigative reports),

affidavits, admissions, and any other facts and observations usually relied upon by claims adjusters or other persons usually charged with the duty to evaluate liability claims.

b. The following conditions must also be met:

- i. There must have been no contributory negligence, to any degree, on behalf of the claimant, or his or her deceased, agent, guest, or tenant, leading to the injury complained of;
- ii. The claim must not be time barred by any provision of law, including the limitation of action, laches, or statute of repose;
- iii. The claimant, or deceased, must not have otherwise been able to avoid the injury of which she/he complains;
- iv. No other defense arising from common law, such as (but not limited to) last clear chance or assumption of risk by court precedent, or statute must apply;
- v. There must be no other joint tortfeasors, contributors, or other parties, which are fully able to compensate the claimant for the loss, damage or injury;
- vi. The claim must not be based in whole, or in part, upon a subrogation, contribution, or indemnity claim of a third party;
- vii. No release, or covenant not to sue, shall have been, or shall be given to any third party, without the City's prior approval;
- viii. The damage, injury, or loss may not be claimed, or be, recoverable from insurance (including, but not limited to, underinsured and uninsured coverage) or any other collateral source; the claimant must voluntarily reveal all such sources;
- ix. The damage or loss must not be the result of any gross negligence, willful misconduct; or intentional, fraudulent, malicious, corrupt, criminal, or lascivious, act by an employee, public official or officer; nor, any act while such employee, public official or officer, was acting under the influence of drugs, or alcohol or was otherwise not in control of her, or his, mental or physical faculties.
- x. The injury, or loss, or damage was not the act of an independent contractor.

c. In the event a claimant is indebted, or becomes indebted, to the City, or the City has a claim, or counter claim, against the claimant such amount owed to the City, whether arising from the occurrence or accident, or otherwise, may be set off against the compensable damages payable to the claimant.

7. The following elements of damages, only, will be compensable pursuant to this policy:

a. Actual monetary loss sustained for personal injury, or for injury to real, or tangible, personal property, including reasonable loss of time and wages, actual medical expenses (including a maximum of \$1,000.00 for State licensed chiropractic care), ambulance

costs, and any other compensable out of pocket loss actually incurred and not prohibited by this Policy;

b. After settlement agreement, a court filing fee, plus a fee for guardian ad litem for minor's settlements only in the maximum amount of \$250.00; and a fee for the attorney for the minor, or guardian, in a friendly suit not to exceed \$250.00.

c. Reasonable attorney's fees to be determined and paid in the sole discretion of the City. In determining reasonable attorneys fees, only those fees incurred between the date of the injury. or damage, and the date the City agrees to offer settlement pursuant to this policy (plus ten working days for the injured or damaged party to determine whether to accept the proposed settlement), but in no event later than the date of the institution of any judicial, administrative, arbitration, mediation, or other involuntary trial or settlement proceeding. The City does not, by the adoption of this policy, consent to any such proceeding.

d. Excluded, among other similar elements, from any damage or loss payment by the City are:

- i. Lost profits or business loss, pain and suffering, mental anguish, other economic loss, disfigurement or scarring; exemplary, vindictive, punitive or aggravated damages, penalties, loss of consortium or other injury to spousal or familial relationships, or any other payment other than to the person actually suffering physical injury or impact, or his, or her, legal representative; also excluded are payments to anyone claiming injury because of observing, or witnessing, the accident or occurrence;
- ii. Loss of intangible property;
- iii. Damages paid from a collateral source, including, but not limited to workman's compensation, insurance, or contribution; should any part of the loss, or damage, be so compensated the City will only consider those elements of damage not so paid;
- iv. Interest, or delay damages, on any settlement;
- v. Libel, slander, or injury to reputation,
- vi. Loss of use, or rental value, for a motor vehicle or other equipment.
- vii. Any subrogated, indemnified, or third party claims' as a result of the occurrence.
- viii. Lost contract revenues as a result of the occurrence;

8. Other conditions of this Waiver Policy are:

- a. This Policy shall not be retroactive and shall apply to all claims filed as the result of accidents or occurrences after the date of its adoption.
- b. The City Manager's authority to settle claims pursuant to Section 7.03 of the City Charter shall be subject to the terms and conditions of this policy. Nothing in this policy shall be construed as otherwise restricting or expanding the authority of the City Manager to settle claims within the limits granted to her, or him, by the Charter.

c. This policy is not a waiver of any other immunity including, but not limited to, legislative, quasi-judicial, public official, officers, or employees immunity, immunity, qualified immunity, volunteers immunity, or any other immunity established by statute or law. Nothing in this policy shall be construed as a total waiver of the defense of governmental immunity as to the City, its officers or employees. This policy shall not create any rights of claimants for which the City, but for governmental immunity would not otherwise be liable.

9. In the event liability, or casualty, insurance has been purchased by the City, or any entity for it, for any hazard or loss pursuant to NCGS § 160A-485 (2000), with the intent to waive governmental immunity, the provisions of the insurance policy shall prevail and this Waiver Policy shall be of no force or effect. In the alternate event the City, or any entity for it has purchased liability, or casualty, insurance policies which by their terms exclude loses, injury, and damage occurring from accidents to which governmental immunity would otherwise apply; then, in that event, this Waiver Policy will apply to such loses. Such insurance policies, which by their terms do not waive governmental immunity, are hereby affirmatively approved, both retrospectively and prospectively.

10. This policy does not apply to claims, which arise from the exercise of judgment, discretionary policy decisions, or ministerial decisions made by public employees or officers in the exercise of their official duties.

11. If the Office of the City Attorney, or retained legal counsel, determines that the defense of governmental immunity does not apply to specific claims, then the claims will be evaluated, settled, or defended, based upon the factors and criteria traditionally applied in the evaluation of claims, and in accordance with applicable, ordinances, statutes, resolutions, laws, and policies adopted by the City from time to time with respect to such claims.

12. The words, terms and phrases used in this Policy shall be given their usual and reasonable meaning. In the event the intent, or meaning, of any such words, terms or phrases is questioned, the City Attorney's Office shall make a determination of such meaning or intent and that determination shall be final.