

# CITYSPEAK

## “THERE’S NO GREY AREA IN YOUR PERSONAL CONSCIENCE”

It has been a long time since I have thought about the “grey area” issue so prevalent in local government administration. Then, during a recent visit from my daughter and her husband, we engaged in a discussion about decisions we make and how we know if our decisions are right or wrong. Interestingly, the “grey area” came up. The grey area is the space we create, internally or externally, that justifies decisions as “technically” not wrong even though it may not actually follow the “spirit” of a law or moral code. Dugan, my son-in-law, said something I found rather enlightening: “**there is no grey area in personal conscience.**”

This simple statement brought on an epiphany that compelled me to write on this topic, the “grey area.” In light of the fraud, corruption, and embezzlement we are all so familiar with in local government, this issue seems highly relevant to our CitySpeak newsletter.

From the day I began my municipal career in 1990 as an Administrative Analyst at the City of Hemet, California, this notion of working “within the grey area” would continue to be present throughout my career, only increasing through the decades I served as a City Director of Finance and Administrative Services for many municipal organizations.

In government, the “grey area” lies in the unclear language on some procedural aspects of rule or law. We determine that, because language may be complex or dense in some legislation, that we have wiggle room, room to push boundaries. However, if we are honest with ourselves, the substantive requirements of the rule or law are clearer than we may at times care to admit.

So while I agree that there exists certain legislation, rule, or law that is “silent” on certain matters of interpretation, we as public administrators usually can get the “true sense,” “legislative intent,” or even the “spirit of the law” as it was likely intended by the authors.

This is where **personal conscience** is of highest value to preserve the public trust as we engage in the practice of our craft in public administration. It is incumbent upon us to remember that we are primarily responsible for interpreting and applying the rule of law, not for bending the law to suit our own purposes or even the purposes of our municipalities.

Regarding the subject of rule of law, you may want to read the article by the World Justice Project by clicking here: <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

But this newsletter is not about “what” the rule of law is or is not. Rather, it is about “how” we as public administrators interpret legislation, rules, and laws, among other statutes and government codes. In truth, this newsletter confronts the need to be conscientious about the preservation of the public trust when we interpret and apply rules and laws, taking care to respect the legislative intent and spirit of those laws, especially when creating “grey areas” to justify our decisions.

Of course, we may argue that there is always a “grey area” in rules and laws, especially when those rules or laws are “silent” on specific application, but the truth is that we can almost always reasonably identify the legislative intent of said rule or law. In fact, this is what we as administrators are trained to do, to apply the law as intended by the authors of the legislation, not as we intend it to be interpreted, even if our motives are to benefit our municipalities and our communities.

It is good to have your legal counsel help you. **We never want to be accused of “engaging in the practice of law”**, but you usually don’t have to be a lawyer to read and understand rules, statutes, government codes, or other legislation, to interpret and apply them in your job as a public administrator. These are usually written at a reading level that most of us with a college degree can understand, unless, of course, we are looking for the “grey area” to apply an interpretation that will align with our recommendation or decision.

Again, upholding the public trust is of highest importance as we decide what to do in our jobs as leaders of and decision makers for our respective organizations. At the end of the day, the final recommendation or decision we make will be left in the public record in perpetuity. We will have to go to bed at night knowing whether we did the “right thing” or not, which affects our personal conscience, much more important than how “creative” we might have been in using the “grey area” to our advantage, or even to the advantage of our local government organization.

**So now we come to the main point of this article: Recognize that there is no grey area in our personal conscience.** Our personal conscience “knows” when we are doing the right thing or the wrong thing because we are the only ones who will have to answer for our actions if we are ever called to explain them on the 6 o’clock news! *It will be our conscience, not anybody else’s, that will keep us up at night and that we are ultimately accountable to.*

## **KNEE-JERK “GREY AREA” REACTION – LOW INCOME HOUSING STORY**

Several times a year during my career as a public administrator, whenever a City ordinance, Council resolution, or even a state or federal law or statute came into question or interpretation as we made a recommendation or financial decision, the typical response was the quick, knee-jerk reaction: Look for the “grey area” to justify a decision “in our favor” (other words were used).

One of my first projects as Administrative Analyst in California back in 1990, was to look for a *loophole* in the “grey area” of the Redevelopment Law so we could justify using the **20% Low Income Housing “Set-Aside” Fund** to help homeless people (or as my City Attorney would call them, “persistent violator’s”). Now this was a fairly easy project to work on as a public administrator new to Redevelopment in municipal government. Yet there would later be more egregious issues I would face in this “grey area” interpretation of Redevelopment Law, as *municipal finance “practitioner”*, related to the use of the 20% Low Income Housing Fund.

As some of you in California may remember, during the hey day of Redevelopment Agencies (RDAs) from 1990-2011, Redevelopment Law, which was created through **Health & Safety Code § 33000 et. seq.** was a most important fiscal policy tool used by local governments to **eliminate blight** in communities. We had to “interpret” this law to help us even with *the “debts and credits” to prepare the accounting journal entries* and “properly” record the tax increment revenues of the RDA, and more importantly, to allocate the 20% Low Income Housing “Set-Aside” funds which, frankly, was usually getting “the shorter end of the fiscal stick” because of the NIMBY (not in my back yard) issues it caused for some local officials in California who did not want to deal with affordable housing “projects” in their communities.

Even today, California certain communities with relatively high assessed value (AV) are in hot water with the state because of their lack of political will or economic inability to achieve inclusionary affordable housing goals. These realities kept these communities from addressing the projected future housing shortages and affordable housing obligations which required them to create solutions for their high AV communities. By kicking the can down the road, decades of opportunities were lost to achieve compliance with the state's Low Income Housing mandates.

We recognize that it is no easy task to achieve inclusionary affordable housing goals in communities where the average home value is north of \$1 million. However, the 20% Low Income Housing "Set-Aside" requirement is nothing new. It has been a part of Redevelopment Law in California since 1979, that's 40 years! Thus, either we will follow the rule of law (Redevelopment Law) or you will have to change it.

Back in 1990, the challenges facing the 20% Low Income Housing "Set-Aside" Fund is clearly understood. And the challenge for us public administrators in 1990, who were still "wet behind the ears", was trying to understand why certain City officials seemed so uninterested in maximizing the benefits and uses of this Low Income Housing Fund, and in some cases, they were interested in freely giving these affordable housing monies.

Thus, the problem was not whether Low Income Housing Fund would receive a 20% allocation from RDA tax increment revenues. Rather, the challenge was determining the "base" revenue figure that would be used to calculate the allocation to be made to the 20% Housing "Set-Aside" Fund. The big question caused by the "grey area" interpretation of some public administrators, was whether to allocate the 20% Low Income Housing "Set-Aside" Fund based on the "gross" or "net" calculation. If the municipality believed it could use the "net" RDA tax increment revenues (net of pass-through obligations to other agencies), leaving a *smaller* base number to use, instead of the *larger* "gross" RDA tax increment revenues, the 20% Low Income Housing Fund would effectively receive fewer dollars to be used for "rehabilitating and expanding the supply of affordable housing", which could be a loss of housing monies that would add up to tens of millions of dollars over the life of the RDA.

Thanks to Low Income Housing advocates (*they were not well-liked by some*) and subsequent Redevelopment implementation guides, the self-serving interpretation by certain public administrators was largely discontinued. Those who looked for the "grey area" or "loophole" in California Redevelopment Law to minimize the monies deposited in the 20% Low Income Housing Fund calculation were eventually forced to prepare the accounting journal entries **based on the "gross" tax increment revenue**. *The interesting experiences with non-profit organizations, like housing advocates, may be the topic of a future CitySpeak newsletter.*

As I think back to when I was a brand new Administrative Analyst in 1990, my reading of the California Health & Safety Code was initially **very black and white**. However, because I was new, it was all the more challenging to stand up to certain senior administrators when they insisted on the more liberal interpretation of Redevelopment Law, following the example of others in California who decided, for obvious reasons now, that the 20% should be based on the lower "net" number to allocate fewer dollars to their Low Income Housing "Set-Aside" Fund.

Years later, I still faced challenges as a municipal finance officer when working for some public administrators who were still looking for "creative" ways of "using up", or even "getting rid of" the 20% Low Income Housing "Set-Aside" Fund monies to avoid having to comply with state law.

I even worked for an administrator who insisted there was a “grey area” that provided a loophole that allowed him to use Low Income Housing “Set-Aside” monies to pay for law enforcement salaries because he felt it satisfied the Health & Safety code’s requirement to “eliminate blight” in his community. This practice was shut down by the state after a short period.

As these real-life examples show, some public administrators, especially those facing tough fiscal or political constraints, looked to the “grey area” instead of looking to the “spirit of the law,” which was, honestly, quite obvious. And rather than looking to the language of the Health & Safety Code that created Redevelopment Law, some in position of authority would seek to find “loopholes” to make a decision that was favorable to the prerogatives of management and the politics of the local governing body.

All too often, as I explained above, some public administrators in a position of authority will conveniently interpret the rule or law to justify their decisions, in the interest of their municipal organization, using the “grey area” as a legal basis for taking liberties with the rule or law in question.

Public administrators may well try to justify their decision to operate within the “grey area” because doing so could benefit thousands of stakeholders of their City organization and their community. They could rationalize away the spirit of the law, or even ignore it entirely, a generally accepted practice followed by other public administrators through false reasoning, all under the guise of improving the quality of life for the residents of their communities, but sadly, sometimes to the detriment of the broader community in their county, state, or the nation.

But if we are honest, the cold hard truth is that we should not allow any public administrator to go around the legislative intent, especially one clearly obvious to any reasonable person, one that should be followed by the local government under the public administrator’s interpretation of said rule or statute. If we do not like the law, we can work to change it. We cannot simply find ways around it. When we do this, when we seek to work within a “grey area,” we are effectively circumventing our entire democratic process.

### **SENSE AND SENSIBILITY: “GREY AREA” DECISION IN LITERATURE AND FILM**

One thing I love about literature and film is that they are rife with fictionalized analogies for the real life sticky situations we find ourselves in, especially when we are in positions of authority.

In the 1995 movie “Sense and Sensibility,” we see the reading of the last will and testament of the Old Mr. Dashwood, in which he requires that his son, John Dashwood, “take care of his stepmother and two stepsisters.” The dying father’s clear wishes in his last will and testament are at first faithfully followed by his son John Dashwood; however, these wishes are later ignored by John as he begins to seek out the “grey area” of the request. John’s greedy wife Fanny conveniently influences John to practice false reasoning and misinterpret what John Dashwood’s father “actually meant.” Ignoring the weighty promise he had made to his dying father, John becomes greedy like his wife, and decreases the payment amount to a measly £500 a year, instead of the more reasonable £3,000 he had originally decided on to satisfy his dying father’s wishes, leaving the three women in his care practically destitute.

Click here to watch the video. Advance to the *1:11 minute mark* and watch through *4:05 minute mark* for this scene of the dying father’s wish: <https://youtu.be/D273QPtGwyE>.

To see the final senseless, circular reasoning by the greedy Fanny and the failure to own up to fiduciary duty of John Dashwood to his dead father's last will and testament, continue to watch the video until the *6:37 minute mark*.

You may find Fanny's comments comical, but this is spot on how many people reason within the "grey area" of a legal matter such as a last will and testament.

## WHAT I LEARNED IN SCHOOL ABOUT "GREY AREA"

In graduate school, we studied the use of metaphors to help public administrators bring clarity to issues in public organizations.

Metaphors are invaluable to the functioning of government, especially to administrators, as legislation, finance, and legalese can often feel murky, dense, and complex. The use of metaphor or analogy as we interpret and try to translate the often convoluted information we wade through brings clarity and comprehension to issues that may feel incomprehensible. Thus, in an attempt to bring clarity to these specific issues, I will continue with the existing metaphor of color.

The use of colors is helpful to highlight the false reasoning that may exist when using the "grey area" justification in decision making, and how this puts in jeopardy the rule of law and ultimately, even our very democracy.

## GREY SHADE IS BETTER THAN "EXTREME" BLACK OR "EXTREME" WHITE

At the two most extreme ends of the color spectrum are black and white. Let us, for this example, let white represent truth and black represent untruth. The vast area in between the color spectrum represents a limitless opportunity to define that area of the color spectrum as existing somewhere between the two extremes of pure truth white and pure untruth black. What color do you get when you mix black and white? You will always get some shade of grey, right?

Sometimes you will have mostly untruth with a bit of truth; other times you will have mostly truth with a bit of untruth, but if you are not dealing with absolute truth, honesty, and transparency, you are in the grey area.

Clearly, vast opportunity exists to create the grey area we have been talking about in this article. It is much easier as living breathing humans living complicated lives to work within the grey area of subjectivity and relativity than it is to work with pure white truth or pure black untruth, which exist at the "extreme" ends of the color spectrum. Why? Because human beings, especially in a collective environment, like Cities and municipalities, let alone states or countries, will never find themselves in complete "pure white" or "pure black" agreement with each other, so we seek to get our way through the presentation and dissemination and even compromise of untruths. "Truth" is often a matter of perspective, so sticking to your truth and your truth only on an issue may result in you receiving the label of extremist.

And who wants to be labeled an extremist, right?

In our modern culture today, we all are happier and more comfortable being labeled "mainstream" or "balanced," "centrists," not too far to the right or to the left. **As public administrators, we need to be politically savvy but never political, yet we must always speak truth without purposely creating political challenges for our elected officials.**

To adhere to *Woodrow Wilson's dichotomy of politics versus administration*, **we must remain outside of the political discussions 100%**, yet we can wait for the right time to speak in the appropriate forum, if we are to be effective public administrators serving our local government organization and our community.

**Effective public administrators can make a positive difference, but because we are not elected officials, we do NOT have their “status” and should NEVER speak out of turn, especially in public. We must wait for the appropriate time and forum!**

And again, if we are brutally honest with each other and remain unpolitical, if we are to be 100% truthful, we will avoid that “grey area” of the color spectrum because any decision in that grey area will have a dose of untruth black color, regardless of the amount.

### **IS IT UNREALISTIC TO MAKE 100% BLACK OR WHITE DECISIONS?**

Some of you will argue that it is impossible to achieve 100% truth in our interpretation of rules, laws, or statutes, and I would have to admit that to some degree you are right. For we would have to consult with the author or authors of the rule, law, or statute for a determination or ruling as to the accuracy of our decision of their law statute or rule.

This would be both impractical and often unfeasible. The wheels of local government would slow down even more, wheels that are already quite slow.

Thus, in the interest of expediency in local government, or government in general, some crafty people will utilize a perceived “grey area” to justify the actions of public administrators, or even governing bodies themselves, without violating legal rules, laws, or statutes.

So am I saying the grey area is justified to make decisions “legally” within the broad color spectrum between truth, white, and untruth, black, and feel free to carry-on “in good conscience” interpreting government rules, laws, and statutes? No, this is not it all what I am saying. *This, my friends, is where your conscience comes in.*

### **PROFESSIONAL ETHICS TRAINING FOR PUBLIC ADMINISTRATORS**

There is no grey area in your conscience, and it must, in the end, be your conscience that guides you. You always know what the right thing to do is based on your own conscience. You don't need to be taught conscience in school.

You can have a Master of Public Administrator (MPA) degree from the Kennedy School at Harvard University or from USC, but those elite programs will NOT train your conscience to make decisions or recommendations that are truthful, honest, and faithful to the legislative intent of the rule or law we use as our authority in proposing public policy or other administrative action.

I am a Certified Public Accountant (CPA) licensed to engage in the practice of public accountancy in California. As a CPA, we have Continuing Professional Education (CPE) that we are required to take: four (4) hours of ethics training every two years and two (2) hours of regulatory review ethics training every six (6) years.

I actually pursued my CPA license while working in City government, to provide me a professional code of conduct I could point to when my superiors asked me to make

recommendations which I knew were wrong. Without my professional code of conduct on the wall, it was just my “opinion” against the opinion of another. I am very glad I invested the 500 hours of study and preparation to pass the CPA exam and obtain the qualifying experience requirement.

And because of the “grey areas” in business decision-making, created through the “complex” and “inter-related” financial system in America, CPAs are required to “train” themselves, or rather remind themselves of the need to be “ethical” for the sole reason of maintaining the public trust in the accounting profession.

Many other government organizations that issue licenses and professional designations available to public administrators working in local government seek to also “train” their members to make the “right” decision through ethics training.

However, do we REALLY need to be trained professionally to make the correct, truthful decision?

No. We don't. *These academic programs are not training us to have a conscience; they are reminding us to use the conscience we already have to make ethical decisions.*

I learned my religion from my mother and my work habits from my father. This is where my conscience was trained to distinguish right from wrong. Each of us learns right from wrong as we navigate our early lives, the true, big picture “good feelings” come from doing what is right and the ugly, shameful, “bad feelings” come from doing what is wrong.

It is our personal conscience that should take precedence to ensure we always make decisions that are truthful and correct according to our “conscience,” not according to some professional “technical” or academic explanation of what is ethically right or wrong.

Remember, a decision or recommendation may be “technically” right, but “wrong” according to our personal conscience.

**Bottom Line:** The human conscience transcends all government rules, laws, and statutes (even higher education). There cannot be any grey area in the human conscience.

## **TRUST YOUR CONSCIENCE AND LEARN TO LIVE WITHOUT THE GREY AREA**

Your conscience knows, deep down in your soul, when a decision is right or wrong. It is only when a decision or recommendation is not in our own personal, immediate best interest that we go against our conscience, arguing against our conscience, causing ourselves unnecessary angst and stress as we try to justify a decision, creating a “grey area” in our mind or using the “grey area” of a rule or law.

Although legally as a public administrator you may be on fairly solid ground making decisions within the grey area of the truth and on truth color spectrum, **you cannot or should not ignore your individual conscience** in doing your job for your local government.

Remember that you did not take the local government job to suit your own personal interests, or even what you think may be the broader interests of your municipality. You took the job, and you took an oath, to apply the law as it was written, as it was intended.

This trouble with application of law is what makes it so difficult for many public administrators to even so much as blow their noses without getting a written “OK to blow your nose” permission slip from somebody else in authority, much less assume responsibility for making decisions that are within their own authority to make. *In a future newsletter we will discuss the difficulty some public administrators have when making decisions.*

But in this newsletter, we must remember the impact of playing within the grey area. You are not just putting your own conscience and consequences on the line. It is likely that if you are playing in the grey area, you are also able to get somebody else to sign off on your grey area decision or recommendation, so it is really somebody else’s neck on the line if the grey area decision goes bad. **Yet your conscience is never off the hook.**

Why? Because there is no grey area in the human conscience!

Your conscience is what will keep you up at night, not whether or not you were able to get the City Attorney or the City Manager or anybody else in position of authority to sign off on your recommendation on a “grey area” matter, transferring responsibility from your shoulders.

**Main Point:** Do not recommend decisions made within the grey area of the truth or untruth color spectrum. No job and no amount of money is worth having a cloudy conscience. You will be happy when you can sleep well at night; \$1 million will not help you sleep better when your conscience is beating you up!

Finally, you may find it best to simply learn to live without the grey area, but only you can make that decision. You could just **let your yes mean yes and your no, no.**

This lifestyle and professional practice will ensure you listen to your conscience “before” you make a decision that goes against it.

Do not wait for 3 o’clock in the morning when you can’t fall asleep thinking about your decision or recommendation made in the “grey area”. Picture yourself begging your conscience to please let you sleep, but it won’t let you, as it wakes you up to suffer with anxiety and stress.

You don’t want to be in the situation!

My dear fellow public administrators, say “no” to recommendations or decisions you are called on to make within the “grey area” **if** it does not agree with your personal conscience!

## **I LOVE YOUR FEEDBACK...**

As always, please call me if you want to share your thoughts on the “grey area” decisions or any other subject I write about in this newsletter; I would love to talk to you about your ideas for interesting municipal topics for future CitySpeak newsletters.

## **MUNITEMPS IS HERE TO HELP...**

And remember, MuniTemps is here for you should you need temporary help to fill a staff vacancy in any municipal Department, especially now that you’re preparing your budget.




As president of **MuniTemps / MuniGlobal**, I am passionate about implementing best practices in local government. I have worked hard during the past 29 years, serving many Cities and Special Districts as Finance Director and can provide your municipality with tried and tested organizational and staffing solutions.

My team and I understand municipal organizations, the budget, the CAFR, and the many nuances of municipal organizations serving their communities.

May you have much success as you carry out municipal best practices and the *continuous improvement* professional work ethic in serving our City organizations!

Respectfully,



**John Herrera, CPA, MPA**

President / CEO & Municipal Finance Officer

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