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**TOWN OF EDGEWOOD  
ORDINANCE NO. 2005-06  
AN ORDINANCE**

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**Providing for the Indemnification of Employees and Elected Officials**

WHEREAS public hearings have been held regarding the legal basis and need for an ordinance clarifying when and under what circumstances the Town of Edgewood should indemnify its employees and elected officials from liability arising out of acts committed in the scope of their duties;

WHEREAS the governing body has determined that the public interest supports an ordinance that will provide for such indemnification on a uniform and consistent basis;

THEREFORE, be it ordained by the Town of Edgewood, by and through its governing body as follows:

**A. DEFINITIONS: For purposes of this ordinance,**

1. "Public employee" means an officer, employee or servant of a governmental entity, excluding independent contractors. "Public employee" specifically includes:
  - a. Elected or appointed officials;
  - b. Law enforcement officers; and
  - c. Persons acting on behalf or in service of the town in an official capacity, whether with or without compensation;
2. "Scope of duty" means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance.

**B. INDEMNIFICATION FROM SUITS ALLEGING TORTUOUS CONDUCT OR VIOLATIONS OF RIGHTS:**

1. Consistent with NMSA 1978, § 41-4-4 of the State Tort Claims Act, unless an insurance carrier provides a defense, the Town shall provide a defense, including costs and attorney fees, for any public employee when liability is sought for:
  - a. Any tort alleged to have been committed by the public employee while acting within the scope of his or her duty; or
  - b. Any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his or her duty.

2. The Town also shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his or her duty.
3. The Town also shall pay any settlement or any final judgment entered against a public employee for:
  - a. Any tort that was committed by the public employee while acting within the scope of his or her duty; or
  - b. a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his or her duty.
4. Notwithstanding the above provisions, the Town shall have the right to recover from a public employee the amount expended by the Town to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that, while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.

**C. INDEMNIFICATION OF PUBLIC EMPLOYEES IN OTHER INSTANCES.** Consistent with state law pertaining to indemnification of officers or directors of corporations generally, the Town, a municipal corporation, makes the following provisions regarding provision of a defense, including payment of attorney fees in instances other than those covered in the preceding sections of this Ordinance:

1. The governing body of the Town shall have power, but is not required to indemnify any person made a party to any proceeding not covered in Section B and by reason of the fact that the person is or was a public employee if:
  - a. The person acted in good faith;
  - b. The person reasonably believed:
    - i. In the case of conduct within the scope of the employee's duty, that the person's conduct was in the best interests of the Town; or
    - ii. In other cases, the person's conduct was not inconsistent with the best interest of the Town.
2. In criminal cases, the governing body of the Town shall have power to indemnify any person made a party to any proceeding by reason of the fact that the person is or was a public employee acting within the scope of

the public employee's duties if the governing body determines the person had no reasonable cause to believe the person's conduct was unlawful.

3. Indemnification under this section may be made against judgments, penalties, fines, settlements and reasonable expenses, actually incurred by the person in connection with the proceeding; except that if the proceeding was by or in the right of the Town, indemnification shall not be made in respect of any proceeding in which the person shall have been adjudged to be liable to the Town or committed misconduct against the Town or its citizens. The termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, be determinative that the person did not meet the requisite standard of conduct set forth in this subsection.
4. In cases covered by this Section, the governing body may order that the reasonable expenses incurred by a public employee who is a party to a proceeding be paid or reimbursed by the Town in advance of the final disposition of such proceeding if:
  - a. The public employee furnishes the Town a written affirmation of his or her good faith belief that the public employee has met the standard of conduct necessary for indemnification by the Town as authorized in this section;
  - b. The public employee furnishes the Town with a written undertaking by or on behalf of the public employee to repay such amounts advanced under this provision if it shall ultimately be determined that the public employee has not met such standards of conduct; and
  - c. The governing body determines that the facts then known to it would not preclude indemnification under this section.
  - d. The undertaking required by subparagraph 4(b) of this subsection shall be an unlimited general obligation but need not be secured.

#### **D. RESERVATION OF CERTAIN RIGHTS.**

1. Nothing in this ordinance shall be construed as a waiver of the immunity from liability granted by State law or as a waiver of immunity from suit in federal court under the eleventh amendment to the United States Constitution.
2. Nothing in this ordinance shall prohibit the Town from providing a defense or otherwise complying with the terms of this ordinance under a reserve of rights, nor from seeking through appropriate legal action a determination of whether it has a duty to the public employee to provide indemnification as provided herein.

WITNESSED AND APPROVED:

  
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Honorable Robert M. Stearley, Mayor

ATTEST:

  
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Town Clerk



**March 9, 2005**