

Ethics Review Board Meeting Minutes
October 4, 2016
11:00 a.m.

Members in Attendance: Board members Ray Martinez, Gino Campana and Kristin Stephens.

Staff in Attendance: Carrie Daggett, City Attorney, Jeanne Sanford, Paralegal, Jody Hurst, Assistant City Attorney.

A meeting of the City Council Ethics Review Board (“Board”) was held on Monday, October 4, 2016, in the City Attorney’s Office Large Conference Room, for review and discussion of draft City Code and Charter amendments in follow up to and as discussed in Ethics Opinion 2016-01.

The meeting began at 11:00 a.m. The Board reviewed the Agenda which contained the following items:

1. Review and Approval of the July 25, 2016 Minutes of the Ethics Review Board.
2. Review and discussion of draft City Code and Charter amendments in follow up to and as discussed in Ethics Opinion 2016-01.
3. Other Business.
4. Adjournment.

Board Chair Ray Martinez stated that this was an Ethics Review Board meeting on October 4, 2016, 11:00 a.m., and after a roll call, declared that all members of the Board were present.

Chair Martinez called for the approval of the July 25, 2016, Minutes of the Ethics Review Board. Chair Martinez asked the Board if anyone had questions or motions.

Motion was made to approve the July 25, 2016, Minutes. The Board unanimously approved the July 25, 2016, Minutes.

Chair Martinez called for the second agenda item, review and discussion of draft City Code and Charter amendments discussed in Opinion 2016-01.

City Attorney Daggett stated she would run through the draft language of the Code and Charter changes.

Chair Martinez stated he had found some issues in the Resolution he would like to address.

Councilmember Campana and City Attorney Daggett stated the Resolution has already been approved and signed by the full Council.

City Attorney Daggett introduced Jody Hurst, Assistant City Attorney, to the Board.

Chair Martinez stated there may need to be more clarity on what is the definition of “attempting to influence”. He further stated that under state statute, it is a class 3 felony.

City Attorney Daggett explained the Code language changes currently being worked on offer an opportunity to make the language more clear and further stated she would take notes on areas Board members would like further elaboration on which she could do in a new draft.

City Attorney Daggett stated this language is intended to address what was briefly referenced in the bottom line of the ethics opinion, and as to specific Code amendments concerning Code-related items outlined on page 6 of the Ethics Opinion where it lays out different points discussed this summer. City Attorney Daggett stated she took these things and put them into Code language. She further pointed out on page 7 of the Ethics Opinion the discussion about the Charter “Sales to the City” provision. The Board’s agenda materials included on page 2 a Charter edit that is provided for consideration as suggested in the Ethics Opinion. That is the second piece of what the Board wanted to talk about.

City Attorney Daggett explained that the new conflict of interest provision starts with the premise that once a member of a board or commission files a conflict, he/she is not allowed to communicate or influence the board in any capacity. The draft then addresses exceptions. The first exception is the one that was identified in the various ethics opinions over the years where someone in their strictly personal capacity without an alternative way for their interest to be represented could, in those circumstances, show up and talk to their board. The second exception provides that a board or commission member is allowed to prepare material in the normal course of business so long as the member is not directly or substantially related to advocacy before his or her board.

Councilmember Campana asked a question regarding the meaning of “directly or substantially” related to advocacy, for example, if you are an engineer working on a proposed development, how are you not advocating for that development if you are proposing the design of the project?

City Attorney Daggett stated that the project design would be for the benefit of the developer rather than for the purpose of the planning and zoning deliberation. City Attorney Daggett recalled that this was the point in the discussion back and forth in the prior meeting upstairs in the City Manager’s conference room where Councilmember Cunniff discussed actively focusing on preparation for persuasive presentation, and noted that the Ethics Opinion calls this out as being not acceptable for board members. The suggested provision was intended to carve out the separate purpose of allowing such materials to be provided, but not for persuading the Board, rather, for an applicant to use them for the project.

Councilmember Stephens pointed out this is not part of persuasion, just preparing materials, because if it were to become part of persuasion, then this would go right back to the ethical dilemma.

Example situations were discussed to better explain the argument.

Councilmember Campana stated he thought the wording had probably captured it.

Chair Martinez stated with regard to the wording, “direct or substantial” that perhaps one of those words could be deleted.

Assistant City Attorney Hurst explained that those were two pretty different terms defined in code sections.

City Attorney Daggett explained that direct or substantial covers two different scenarios - one where it is direct and one where it is substantial.

Councilmember Campana suggested changing the word, “or” to “and”.

City Attorney Daggett stated she could change the word to “and” in that paragraph which would make it narrower if the Board preferred that narrower approach.

Councilmembers Campana, Stephens and Martinez agreed with that suggested approach.

City Attorney Daggett called attention to *romanette (iii)* in the hand-out discussing the variance process where she tried to cover two things, 1) how it would work; and 2) the standard to be applied.

City Attorney Daggett ran through how the process would work: a request for a variance would be submitted to the clerk; the clerk would generate a form to get Council the information needed; Council would then consider the variance at a public hearing; the member would be allowed to present his/her argument; and the public would be allowed to comment. Ms. Daggett further explained this would be the normal process for an agenda item, but like in protest hearings, the applicant would have a special chance to talk. City Attorney Daggett noted one thing that could be added was a chance for rebuttal after citizen comments, if the Board thought that would be desirable.

Councilmembers Campana and Stephens commented they liked that addition.

City Attorney Daggett stated she would add that positive addition to the language.

City Attorney Daggett discussed the 10 days’ notice time frame.

Councilmember Stephens stated that because a variance usually allows for a hardship situation, the time frame might be an issue.

City Attorney Daggett discussed adding a provision that the applicant could waive the time requirement for notice, and all members of the Board agreed on that.

City Attorney Daggett then discussed that Council could grant the variance either by motion or resolution. Ms. Daggett pointed out that by motion, the variance would be less transparent and documented whereas resolutions are readily available for public viewing.

Councilmember Campana stated that a resolution would be the better way to handle it.

Councilmembers Campana and Stephens agreed the resolution was the way to go.

City Attorney Daggett stated the only other thing about a variance was the standard that subsection two lays out, which was the test that the member must have an “exceptional hardship”. Ms. Daggett stated she wanted to make sure the Board was comfortable with that.

Councilmembers Stephens and Campana noted they were good with that as written.

City Attorney Daggett stated that the Clerk’s office generally will prepare a guidance document and will work with people so they know what all they will have to do to apply for a variance.

Chair Martinez discussed using the words “shall” and “may” in the Code language. Chair Martinez further stated that under *romanette (i)*, it makes more sense to say “is permitted”. Also, he asked for confirmation that under *romanette (iii)*, the language will define what “influence” means.

City Attorney Daggett stated she would work on the definition and then will send out to members of the Board for review, with perhaps a follow-up discussion.

Chair Martinez and Councilmember Stephens stated email would be preferable.

City Attorney Daggett and Assistant City Attorney Hurst discussed the legal issues around using the words, “shall” and “must”. Asst. City Attorney Hurst stated that “must” is becoming the standard terminology in legal writing for mandatory provisions.

City Attorney Daggett asked if everyone wanted to talk about the fairly minimal changes to the Charter language. The changes respond to the question that had been raised about the current language prohibiting a City officer being involved in a sale to the City if the officer affects the decision making authority or exercises supervisory authority over services. Ms. Daggett explained that has never been interpreted to mean, for example, that a water board member with a catering business that caters the food for the Parks and Recreation Board, could not supervise the performance of that service. Ms. Daggett explained the question came up because there was room for interpretation in the Charter language and the feeling was that it would be beneficial to have the Charter be clear that the prohibition is about the person in a supervisory role for the City, not the person’s role as service provider. Ms. Daggett stated that the conflict of interest provision (in deciding which caterer to use), still applies, but this eliminates the blanket prohibition for someone who actually has nothing to do with the City in connection with the services they are providing. This addressed the problem that if you read the current language broadly, you could interpret it to restrict much more than was probably intended.

Councilmember Campana questioned how it applies to real or personal property too. Mr. Campana explained, for example, you have gravel pit and you're on the Cultural Resources Board, the City could not buy gravel from you; we need to fix that.

Chair Martinez states that was a good point.

City Attorney Daggett stated that this is a challenge for Councilmembers because there is a blanket prohibition for Councilmembers in paragraph A, but B and C is never actually applied in a strict way, so these changes would more clearly document provisions and how it has been read. Ms. Daggett explained that it would be beneficial as it would eliminate the argument on what the provisions mean; B covers non services. Council is covered under A, and it is clear and blanket strict.

Councilmember Stephens stated that it kind of needs to be strict.

City Attorney Daggett pointed out that personal services is completely excepted, because we are all providing personal services to the City.

Councilmember Campana asked what about personal service as a consultant?

City Attorney Daggett stated she will need to look at the Code, but the term is not a contractual relationship.

Councilmember Campana stated maybe we need to clear that up unless you have that already defined somewhere.

Asst. City Attorney Hurst stated that was not defined in Section 9.

City Attorney Daggett stated the difference would be an employment relationship vs. contractual relationship or an independent contractor, which is what a vendor typically would be.

City Attorney Daggett discussed how this situation is challenging since Council is the ultimate decision maker on how much money is to be spent on things, so it is hard to take Council out of the decision-making for anything because ultimately, Council is appropriating the money and budgeting and that is the logic behind it, whereas other City employees are out of the decision making chain.

Councilmembers and City Attorney Daggett discussed different scenarios and how this would play out, i.e., as an Uber driver, CSU employee, etc.

City Attorney Daggett stated the Board's materials under Tab 1 and 2 contain the financial interest definition. Ms. Daggett stated that the Charter definition is the one we should look at since the Code tracks the Charter. Ms. Daggett read the definition of financial interest. The first exception in that definition is a big one, as there are a lot of times when, for example, if it is CSU or another big entity that does business with the City, the employee with CSU is not likely to

have a conflict because there usually is a really low foreseeable, measurable benefit. Paragraph 8a in the Code section tracks what Ms. Daggett was reading in the Charter.

Chair Martinez and Councilmember Campana felt that cleared the issue up.

City Attorney Daggett added that on the conflict rules, an alternative way to approach this as it relates to Councilmembers (and obviously, she stated, she was not advocating for this, but just something to think about), there are times when a Councilmember or board of directors for a corporation might have an interest they cannot avoid and in that instance, the Charter could provide that they must stay out of the decision, but could still allow them to have transactions with the organization, just no input in the decision.

Councilmember Campana stated that he felt the biggest challenge was real property sale. There is no easy way with that.

Councilmember Stephens added that you would want to make sure Council is protected in that regard.

Councilmember Campana stated that the way Council has dealt with this issue in the past is if it's in the ordinary course of business, it would be allowed.

City Attorney Daggett stated because all real property is unique in the eyes of the law, it is true that real estate is most difficult to deal with, because if the City wants or needs a property, sometimes there would be no way to substitute a different property and avoid the Councilmember issue.

Chair Martinez asked the Board if there were any other issues.

City Attorney Daggett stated that she would like to talk about process. Ms. Daggett stated she will revise the latest version and send it out so that the Board could make sure it captures what the Board was hoping for. Ms. Daggett added that she could schedule another meeting if needed and would redline the changes for the Board. The sense of the Board was to wait and see if another meeting would be helpful.

The Board voted unanimously to adopt Chair Martinez's Motion to adjourn the meeting.

Meeting Adjourned at 11:52 a.m

Carrie M. Daggett, City Attorney