

---

DATE: September 16, 2014

TO: City Council  
James Earp, City Manager

FROM: W. Ken Johnson, City Attorney

SUBJECT: Opinion re: Code of Ethics, Part B, Section 1

---

*ISSUES*

The question has been asked whether a city official or employee violates Part B, Section 1 (“Improper Economic Benefit”) of the city’s Code of Ethics if the official or employee recommends or performs any other affirmative act alleged to be favorable to a nonprofit entity that stands to receive grant funds from the city.

A second issue is whether a nonprofit entity that is reimbursed by the city with city funds is ineligible to apply for a downtown revitalization grant.

*OPINION*

1. *A violation of Part B, Section 1 more than likely occurs* in the case where a nonprofit entity stands to receive grant funds from the city, and a city official<sup>1</sup> or employee<sup>2</sup> who serves as an officer, director or in any other policy-making position of the nonprofit entity performs any affirmative act within the scope of the official’s or employee’s duties, including making a recommendation in favor of the nonprofit entity. The recommendation amounts to “official action”<sup>3</sup> on the part of the employee or official. It is “likely to affect the economic interests of” the nonprofit entity by way of the nonprofit benefitting from a contract with the city to receive such grant funds. It is presumed the official or employee knows his or her recommendation is likely to affect the nonprofit’s economic interests in such a way. Serving in an official capacity for the nonprofit increases the likelihood of a violation.
2. The purpose of Part B, Section 1 is to avoid the appearance and risk of impropriety on the part of a city official or employee. The section presupposes that the appearance and risk of

---

<sup>1</sup> The terms “official” and “city official” are defined at Part A, Section 2(u) of the ethics code. The definition of official or city official includes more positions than just the mayor and members of the council. Part A, Section 2(u).

<sup>2</sup> The term “employee” is defined at Part A, Section 2(o) (“Definitions”).

<sup>3</sup> “Official action include: any affirmative act (including the making of a recommendation) within the scope of, or in violation of, an official or employee’s duties. . . .” Part A, Section 2(v).

impropriety is avoided if the city official or employee does not take any official action that he or she knows is likely to affect the economic interests of, in this case, a nonprofit entity.<sup>4</sup> Singling out officials or employees who serve in an official capacity (officer, director, etc.) emphasizes the section's requirement to avoid the appearance and risk of impropriety.

3. Notwithstanding paragraph 1, there is nothing to suggest under Part B, Section 1 that a city employee or city official may not otherwise serve as an officer, director or in any other policy-making position for a nonprofit entity. In fact, such service is implied to be allowed,<sup>5</sup> and such service per se does not create an economic interest in favor of an official or employee.<sup>6</sup>
4. For purposes of the circumstances being addressed by this opinion, five preconditions must occur *before* a city official or employee may be said to not be avoiding the appearance and risk of impropriety, thereby violating Part B, Section 1: (1) an official or employee takes official action (2) that he or she knows (3) is likely to affect<sup>7</sup> the economic interests of (4) a nonprofit entity, and (5) for which the official or employee serves as an officer, director, or in any other policy-making position.<sup>8</sup>
5. Besides making a recommendation, a city official or employee taking "any affirmative act" within the scope of the official's or employee's "duties" amounts to taking official action. The ethics code does not define or otherwise describe what is meant by an affirmative act or duties.<sup>9</sup>

---

<sup>4</sup> Read together, subsection (a) and subparagraph (a)(8) states the general rule of Part B, Section 1:

General Rule. To avoid the appearance and risk of impropriety, a city official or employee shall not take any official action that he or she knows is likely to affect the economic interests of . . . a . . . nonprofit entity for which the city official or employee serves as an officer or director or in any other policy making position. . . .

<sup>5</sup> Part B, Section 1(8).

<sup>6</sup> The meaning of "economic interest" is further defined at Part A, Section 2(n): "Service by a city official or employee as an officer, director, advisor, or otherwise active participant in an educational, religious, charitable, fraternal, or civic organization does not create for that city official or employee an economic interest in the property of the organization."

<sup>7</sup> To "affect" the economic interests of a third party does not just mean a third party's economic interests are benefitted by the actions of a city official or employee; to *affect* would also include doing harm or damage to a third party's economic interests.

<sup>8</sup> Part B, Section 1(a) and subparagraph (a)(8).

<sup>9</sup> It may be argued that the vagueness of such a term makes it highly unlikely, or even impossible, that an official or an employee would know when they were committing an "affirmative act," especially since such an affirmative act appears to be exclusive of an employee's "duties". That is, doing an affirmative act appears to be something altogether outside the scope of an employee's job duties (if that's what "duties" is referring to).

6. A city employee or official making a recommendation or performing any affirmative act within their duties (official action) is not by itself a violation of the section. The employee *must know*<sup>10</sup> their official action is “likely to affect the economic interests of . . . a nonprofit entity for which the city official or employee serves as an officer or director or in any other policy making position.”<sup>11</sup>
7. A nonprofit entity would enter a contract with the city if the entity received grant funds. Such a contract amounts to “economic interests” of the entity.<sup>12</sup> An official or employee recommending or taking other affirmative action on behalf of the entity equates to the employee or official taking official action they presumably know would likely affect the economic interests of the nonprofit entity, i.e., the grant funds.
8. Part B, Section 1(c) describes the meaning of an action likely to affect an economic interest as an action that is “distinguishable from its effect on members of the public in general or a substantial segment thereof.” The word “distinguishable” suggests an official’s or employee’s official action leads to a nonprofit entity (for example) benefitting in an exclusive way that the general public or a substantial segment of the general public does not. In the circumstances at hand, it could be alleged that the nonprofit would benefit in a way distinguishable from the general public or a substantial segment because it might be one of few to receive grant funds.<sup>13</sup>
9. Part A, Section 1 does not require that the official or employee benefit in any way, monetarily or otherwise, before a violation results. Rather, the section is addressing an official or employee who interacts with a nonprofit entity.

---

<sup>10</sup> Part A, Section 2(t) defines “knowingly” but such section does not specifically include “knows.” Part B, Section 1 reads that the official or employee “knows” their official action is likely to affect a nonprofit’s economic interests. The definition of “knowingly” says “when he or she is aware of the nature of his or her conduct or that the circumstances exist.” The use of “knows” and the way “knowingly” is defined suggests an actual-knowledge standard is required, in contrast to a should-have-known standard, which incorporates the legal rule that the actions of an individual could be judged by what a fictional reasonable and prudent person should have known. Such a standard is customarily used in civil cases by juries to impute knowledge on a party, whether or not the party actually had personal knowledge of some fact or circumstance.

Although it may or may not be proved by circumstantial evidence that an official or employee “knows,” the fact that Part B, Section 1 requires actual knowledge suggests a violator of the section would must have a state of mind such that the violation is intentional, not inadvertent. To allege something less than actual knowledge would not demonstrate that the official or employee did not intend to avoid the appearance and risk of impropriety.

<sup>11</sup> Part B, Section 1(a) and (a)(8).

<sup>12</sup> The definition of economic interest “includes, but is not limited to, legal or equitable property interest in land, chattels, and intangibles, and *contractual rights having more than de minimus value*” and as well, certain management interests in mutual or common investment funds. [*Italics added*]. Part A, Section 2(n) (“Definitions”).

<sup>13</sup> Another example would be a council member votes for a tax decrease that benefits the member because the member’s taxes are lowered. However, this is not a conflict of interest because all other taxpayers (general public or a substantial segment) also benefit. In contrast, if a council member voted for a tax break that benefitted only his family members, then obviously it would be a conflict of interest in violation of Part B.

10. Part B, Section 1 governs only city officials and city employees. It mentions nonprofit entities in the context of a city official or employee interacting with a nonprofit entity in a way that is prohibited by Part B but does not otherwise apply to nonprofits.
11. There is no language in Part B, Section 1 of the Code of Ethics prohibiting a non-profit organization that contracts with the city to be reimbursed a portion of city taxes to apply for a grant to assist in downtown revitalization.
12. Part B, Section 1(d) directly restricts *city council members* who may be on the board of a public or private non-profit organization:
  - (1) The council member may “have a voice” but cannot vote on any “funding request or contract with the City by that organization” unless the organizations’ board of directors or trustees are “in whole or in part” appointed by council.
  - (2) Council members appointed to serve on the board of a non-profit corporation or other legal entity *created by the city* shall have a “duty” and the authority to participate in any discussion by such board and vote at a city council meeting regarding the city-created organization.