

## MEMO

TO: Boulder Town Council  
FROM: Lee Nellis, FAICP  
DATE: March 26, 2023

### **RE: Ethics**

Ethics, as you know, are a difficult topic, made doubly difficult by the realities of living in a small place. But Boulder's size also makes trust in local government doubly important. I think your current community conversation about ethical issues reflects an understanding that your sense of community will be undermined if anyone who holds a public trust uses that position for personal gain or to act out personal biases.

The best advice I can give is for you all to take a deep breath and step back from the immediate and particular for a moment. That will, hopefully, allow you to reach general agreement about the responsibilities of the people who are elected, appointed, or employed to serve the Town. That agreement can then be applied case-by-case. This memo ends with a recommendation about what it might look like. To get there, the memo addresses the idea of the public interest, how state law deals with ethical questions, and practical issues.

### **The Public Interest**

Numerous books have been written about this, but I will be brief.

The expectation in our country has always been that those who take on any role of public service can, and will, set aside their personal interests and work toward the common good. The professional code under which I operate says this:

Examine our own cultures, practices, values, and professional positions in an effort to reveal and understand our conscious and unconscious biases and privileges as an essential first step so we can better serve a truly inclusive public interest *promoting a sense of belonging* [emphasis added].

I am not advocating, as you will see, that Boulder adopt anything quite like that. I share it here because it speaks to the need to be aware of one's own biases when conducting the public's business and, even more so, because I want you to think carefully about the "sense of belonging." Isn't that what being part of a community is about? Isn't that what the people of Boulder aspire to hang on to? Isn't that what unethical conduct threatens?

### **Ethics in Utah Law**

Utah law addresses one type of ethical problem – conflict of interest - in the Municipal Officers and Employees Ethics Act (§§10-3-1301, et seq) and in the act creating the Political Subdivisions Ethics Review Commission (§§63A-15-101, et seq). The law identifies several types of conflict of interest which are listed in the appendix to this memo for those who want a better understanding of what "conflict of interest" means.

The Political Subdivisions Ethics Review Commission hears complaints about possible ethical violations by local officials or employees, makes findings, and recommends actions that may include removing a person from office and/or criminal prosecution. The law allows municipalities to create their own ethics review commissions (§10-3-1311), but a local commission is bound to the provisions of state law. It may not address other ethical issues, use different definitions, set different penalties, or otherwise exercise home rule.

These constraints mean, as I understand them, and as I have been advised by Meg Ryan at the Utah League of Cities and Towns, that there is no reason for a municipality to create an ethics review commission. There are, instead, good reasons not to. Undisclosed conflicts of interest are misdemeanors or even felonies. A local ethics review commission would have to operate under the strict standards of procedure and evidence necessary to refer a case for criminal prosecution. Boulder can't support that.

A few Utah municipalities do have ordinances that require local officials or employees to recuse themselves from participation in certain decisions in addition to disclosing potential conflicts of interest as required by state law. That seems reasonable, but because there is no explicit authorization for it in state law, there is a risk that a recusal requirement would not be upheld if challenged. That doesn't mean you can't make recusal a consistent practice, as I propose in my recommendations.

### **Ethics in Practice**

Whether in a small town or large, there are only so many people on the town council or any appointed body. Strict conflict of interest rules do have the potential to result in a municipality being unable to make a certain decision. That is, one presumes, why state law only requires the disclosure of potential conflicts.

But even if you can always get a quorum, the real constraint you face is one of trust. If someone who is widely perceived to have a conflict of interest participates in or votes on decisions that may be of personal benefit, how credible are your decisions? Even if potential conflicts of interest are disclosed, how credible are your decisions if that disclosure makes no difference?

It is also true that conflicts of interest are not the only actions that can erode public trust. My recommendations ask you to think, for example, about *ex parte* communication as a potential ethical concern, but beyond any formally defined violation, people expect public officials and employees to act in the public interest, not on their own. To put it bluntly: Local officials or employees compromise trust in government when it is not clear that they are acting in the community's interest.

### **What Can Boulder Do?**

My first observation is that Boulder is at a point where ethical issues must be openly addressed. My second observation is that the laws under which you operate don't provide a good way to address ethical issues locally. If someone believes that there is a conflict of interest that violates state law, they are (I acknowledge that this is difficult, but it's the way the system works) going to have to file a complaint with the Political Subdivisions Ethics Review Commission.

Third, the issues with which you are contending go beyond any specific alleged conflict of interest to the larger question of public trust. The Town Council can, if it will, address that, and here are my suggestions about how to do so. While state law takes a negative approach to ethics (defining violations, setting punishments), what I suggest is mostly positive; what you should do, not what you shouldn't.

**Annual Disclosure Forms.** The Town should continue the practice of everyone (elected, appointed, employed) filing a potential conflict of interest disclosure form every year. You should make this filing a condition of employment and continuing appointment to any board, commission, or committee. I don't think you can refuse to seat an elected person who refuses to file. One hopes that peer and public pressure, as well as the possibility of a complaint under state law, would be sufficient to make everyone participate.

**Case-by-Case Disclosures.** You should acknowledge that the annual filing is not enough. The Mayor and Council members should routinely be offered the opportunity to disclose potential conflicts of interest as business proceeds. You need to discuss the best way to accomplish this.

- The draft bylaws your PC is using on a trial basis provide that whoever is presiding ask members if they wish to disclose a potential conflict of interest or *ex parte* communication before every hearing. This is standard operating procedure for planning commissions everywhere, but the work of a town council is far more diverse. Not everything you do that raises ethical questions is subject to hearing. It may not always be apparent when the Mayor should ask for disclosures.
- One alternative, then, would be to combine a call for disclosures with the approval of the agenda at the beginning of each meeting.
- It is important to remember as you talk about all this, that you don't have to decide whether or not there is an actual conflict of interest. That can only be done in the proceedings set up by state law. All you must decide is whether there is a potential conflict.

However you do this, if there is a quorum without them, any member declaring a potential conflict of interest should recuse him or herself, sitting out the discussion and not voting. Many jurisdictions require a recused member to leave the room. If there is no quorum, the Mayor and Council will have to discuss the situation. If a member is absent, the best solution will probably be to table the matter until they return. If there is no absence, the Council could permit a member disclosing a potential conflict of interest to vote once everyone clearly understands the nature of that potential conflict. This probably satisfies state law. It may or may not uphold the public trust.

**Discuss *Ex Parte* Communication.** Elected and appointed officials are supposed to listen to their constituents, all of them, with more or less equal openness. *Ex parte* communication happens when anyone (including possibly a prospective bidder, a job seeker, or a permit applicant, or any of their close relatives or business associates) have your ear outside lawfully noticed meetings in a way that other citizens do not. State law does not require the

Town to do anything about *ex parte* communication. Upholding the public trust may. This is something you should talk about.

**Discuss Confidentiality.** It is possible that Town officials or employees will be entrusted with information that should remain confidential. This could happen during personnel actions, when reviewing bids, and possibly in other circumstances. Sharing confidential information for your own benefit is a violation of state law (§13-3-1304(2)(a)). This also is something you should talk about.

**Discuss Accepting Gifts.** State law forbids accepting anything of economic value if accepting it may be perceived as influencing your decisions as a Town official or employee (§13-3-1304(2)(c), note that beyond the ethics act, there is also a law against bribery). The law provides for occasional small gifts (something like the free calendars some firms give away or a box of chocolates). It is always a good practice to share these pecuniary gifts, When I was a Town Planner we got a huge box of chocolates every holiday season. We just put it on the counter for everyone to indulge. Since you already know that I'm going to say you should talk about this, too, I want to explain that I am suggesting all this discussion because it will show your constituents that you are taking ethical conduct seriously.

**Personal Use of Town Assets.** It should be obvious that personal use of Town assets or resources is not allowed. Even this should be discussed, as a reminder.

**Schedule Ethics Training.** It would be wise to schedule a refresher course on ethics at some time every year. You should be able to obtain assistance with this training from the Utah League of Cities and Towns.

**Adopt an Aspirational Ethics Policy.** An ethics policy would incorporate the suggestions I have just made and possibly more. What I suggest below applies to elected officials. Policies for appointed officials and employees would require slightly different wording. You should also add something about ethical conduct to all job descriptions. The Town should ask everyone who is appointed and all employees to sign the policy you eventually adopt, acknowledging that they have read and will adhere to it. The signatures of elected officials have to be voluntary, I think, but should be expected.

### **PROPOSED Boulder Town Ethics Policy**

We understand that the voters of Boulder Town have chosen us to serve the public interest, and that is what we will try to do as we deliberate on the Town's business. We bring our own experience to those deliberations, of course; how could we not? But to uphold the public trust, we will strive to set aside personal interests and biases in a sincere and conscious effort to find the best solutions for the entire community. In service of this goal, we will:

- annually file a potential conflict of interest form that will be available for public review;
- disclose specific potential conflicts of interest, as they are defined by state law, during the regular conduct of the Town's business;

- listen respectfully to all citizens and disclose *ex parte* communications that might be perceived to unduly influence us;
- recuse ourselves whenever there is a potential conflict of interest or potentially inappropriate *ex parte* communication unless the Mayor and Council formally (by motion and majority vote) determine that allowing a member who would otherwise be recused is the only way a necessary decision can be made;
- never divulge any confidential information that we receive in the course of our deliberations or duties;
- not accept anything of economic value in exchange for our service, however small that value may be, because our acceptance may be perceived as an attempt to influence our decisions (occasional small gifts, like a calendar to hang on the Town Hall wall or a box of chocolates, may be graciously accepted if they are shared);
- confine any use we make of Town assets or resources to business authorized by the Mayor and Council and properly account for any public funds we are permitted to spend;
- require the boards, commissions, or committees we appoint and all employees to follow these policies, which may be modified and expanded as necessary for their specific roles in Town government; and
- schedule at least one training session on the ethics of public service every year.

## **Appendix - Definitions of Conflict of Interest from the Municipal Officers and Employees Ethics Act**

The state definition of an ethics offense is found at §10-3-1304, which is reproduced below. I have reduced the subsequent sections of the act, which expand on §10-3-1304, to a practical list. You have a conflict of interest that must be disclosed as provided by law, if:

You take compensation for assisting a person or business in obtaining something it is seeking (for example, a contract, job, or permit) from the municipality in which you hold office or are an employee. §10-3-1305

You have an interest in a business that is regulated (for example, that requires a business license, building permit, or land use approval) by the municipality in which you hold office or are an employee. §10-3-1306

You have an interest in a business that provides goods and/or services to the municipality in which you hold office or are an employee. §10-3-1307

You have an investment (remember that real estate may be an investment) the value of which may be affected by an action of the municipality in which you hold office or are an employee. §10-3-1308

### **10-3-1304. Use of office for personal benefit prohibited.**

- (1) As used in this section, "economic benefit tantamount to a gift" includes:
  - (a) a loan at an interest rate that is substantially lower than the commercial rate then currently prevalent for similar loans; and
  - (b) compensation received for private services rendered at a rate substantially exceeding the fair market value of the services.
- (2) Except as provided in Subsection [\(4\)](#), it is an offense for an elected or appointed officer or municipal employee to:
  - (a) disclose or improperly use private, controlled, or protected information acquired by reason of the officer's or employee's official position or in the course of official duties in order to further substantially the officer's or employee's personal economic interest or to secure special privileges or exemptions for the officer or employee or for others;
  - (b) use or attempt to use the officer's or employee's official position to:
    - (i) further substantially the officer's or employee's personal economic interest; or
    - (ii) secure special privileges for the officer or employee or for others; or
  - (c) knowingly receive, accept, take, seek, or solicit, directly or indirectly, for the officer or employee or for another, a gift of substantial value or a substantial economic benefit tantamount to a gift that:
    - (i) would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or
    - (ii) the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

- (3) Subsection [\(2\)\(c\)](#) does not apply to:
- (a) an occasional nonpecuniary gift having a value of less than \$50;
  - (b) an award publicly presented in recognition of public services;
  - (c) any bona fide loan made in the ordinary course of business; or
  - (d) a political campaign contribution.
- (4) This section does not apply to an elected or appointed officer or municipal employee who engages in conduct that constitutes a violation of this section to the extent that the elected or appointed officer or municipal employee is chargeable, for the same conduct, under Section [76-8-105](#).