

Confidential Attorney-Client Communication

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CONFIDENTIAL MEMORANDUM

TO: **MAYOR and COUNCIL MEMBERS**

FROM: **James R. True**

CC: **Sara Ott**
Kate Johnson
Luisa Berne

DATE: **August 5, 2024**

RE: **Participation of Councilor Guth in Entrance to Aspen Discussions**

On June 25, 2024, Kirk Gregory, a city resident, submitted to the Mayor and City Council members a letter which requested that City Council “take up” the question of whether Councilor Guth’s participation in discussions and decisions related to the “Entrance to Aspen” is an ethical violation under state and local codes and whether such codes would require him to recuse himself from such discussions and decisions. I have reviewed the substance of the allegations and submit to Council the following response. A copy of Mr. Gregory’s letter is attached.

As noted, the conflict that is alleged arises as a result of the Council’s consideration of the “Entrance to Aspen.” What is known as the debate over the “Entrance to Aspen” includes proposals for new construction of a roadway and bridge over the Marolt Open Space, often referred to as the “straight shot”, and proposals for improvements of what is known as the S-curves from Main Street, over 7th and Hallum, then across the existing Castle Creek Bridge. Various different versions of construction and re-construction along these alignments are being considered. The “straight shot” would follow Main Street right-of-way as it passes 7th Street, although the exact alignment as it continues west has not been determined.

The discussions before Council at this time and the decisions that may be requested are mainly administrative issues, particularly funding but also including use of city owned property. There are no land use items or quasi-judicial actions that are presently being considered or likely to be considered involving the issues at hand.

It is recognized that Councilman Guth owns and resides in property that is within the proximity of the areas of debate in the Entrance to Aspen discussions. Specifically, Councilor Guth’s property is approximately 130 feet from the Main Street right-of-way, west of 7th Street. It is also approximately 210 feet from 7th Street right-of-way and approximately 390 feet from Hallum Street.

Pertinently to this review, the complaint primarily relies on state statute, particularly C.R.S. Section 24-18-109. The complaint sites subsection (2)(b) of that statute, which states as follows:

(2) A local government official or local government employee shall not:

(b) Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest, or is engaged as counsel, consultant, representative or agent.

This provision is similar to the provisions of the Aspen Municipal Code which provides in Sec. 2.02.020 – Definitions:

Substantial interest means and includes a situation, including without limitation, a pecuniary stake in the outcome of a direct official action in which, considering all of the circumstances, a reasonably prudent person would expect a marked tendency to make or take a direct official action other than in an objective manner.

In both the State statute and the Municipal code, financial interest is defined as including ownership of real or personal property. Although the Municipal Code also relies on the term “pecuniary stake,” that term is not defined.

The complainant, quoting the Aspen Times, makes the assertion that Councilor Guth’s property is “in the most affected neighborhood” with regard to the Entrance to Aspen. This assertion is itself a subjective statement and even if accurate does not support a conclusion that Councilor Guth has a conflict. The language of the State statute requires that an official act is “directly and substantially affecting to its economic benefit a business or other undertaking.....” The City’s rule requires “a pecuniary stake in the outcome of a direct official action.” In this instance, despite his proximity to the project, the effect is not direct and whether such effect is positive or negative is speculative. Further, even using a standard definition of “pecuniary”, i.e., consisting of or measure in money, such a “stake” is extremely speculative.

Because of the speculative nature of these requirements, it becomes necessary to look at particular proscriptions regarding conduct. The definition of “Substantial interest”, Sec. 2.02.020, cited above includes the following provisions:

By way of example and not limitation, a person shall be deemed to have a substantial interest if:

- (a) He, she or a member of the immediate family is a party to a transaction;
- (b) He, she, a spouse or a domestic partner owns a one percent (1%) or more or a member of the immediate family other than a spouse or domestic partner owns five percent (5%) or more, of another party to the transaction;
- (c) He, she or a member of the immediate family is an officer in another party to the transaction;
- (d) He, she or a member of the immediate family is directly involved in obtaining the City's business for another party to the transaction;

(e) He, she or a member of the immediate family is directly involved in direct official action regarding a transaction for another party to the transaction, other than a purely clerical capacity; or

(f) A member of his or her immediate family performs more than a nominal portion of the work required by the transaction or supervises or manages more than a nominal portion of the work.

(g) He or she or a member of his or her immediate family resides or owns property within three hundred (300) feet of a property that is the subject of a quasi-judicial proceeding.

In addition, the Aspen Municipal Code provides the following specific constraints regarding ethical conduct of a sitting City Councilmember:

Sec. 2.02.030. - Rules of conduct governing City Council members, City officials and employees.

A City Council member, City official or an employee shall not:

(a) Disclose or use confidential information acquired in the course of his or her official duties in order to further substantially his or her personal financial interests;

(b) Disclose or use confidential information acquired in the course of his or her official duties as an attorney-client communication from the City Attorney or other counsel retained by the City without the consent of the City Council;

(c) Assist any person for a contingent fee to affect the outcome of a direct official act;

(d) Perform a direct official action without following the procedure prescribed by Section 2.02.050 of this Chapter if such person:

(1) Has a substantial interest in any transaction with the City;

(2) Has an immediate family member with a substantial interest in any transaction with the City;

(3) Has a substantial interest as an affiliate of a firm with a substantial interest in any transaction with the City; or

(4) Has a substantial interest as an affiliate of a firm appearing on behalf of or employed by a person with a substantial interest in any transaction with the City.

The evaluation of both Sec. 2.02.020 and Sec. 2.02.030, cited above, must focus on the applicable provisions therein. It is clear that most provisions simply do not apply here. For instance, with regard to subsections (a) (b) and (c) of 2.02.030, there is no allegation in the complaint that there has been any inappropriate disclosure of confidential information or that Council Guth is assisting any one for a contingent fee to affect the outcome of a decision.

Thus, remaining is subparagraph (d) and most of Sec. 2.02.020. However, all of these prohibitions involve some improper participation of the council member in a “transaction.”

“Transaction” is defined and “means and includes any contract; any sale or lease of any interest in land, material, supplies, services or any granting of a development right, license, permit or application.” There is no specific “transaction”, as defined in the code, in these considerations in which it can be alleged that Councilor Guth has a “pecuniary stake.”

It is also important to note that any penalties associated with the State statute are transactionally based, particularly related to contracts or the receipt of personal financial gains that are offered to influence official actions. See, C.R.S. Section 24-18.5-101.

In interpreting legislation, rules of construction require that all provisions are reviewed together to determine intent of the legislation. Using these standard rules of construction, subsection (g) within the definition of “Substantial interest” is informative. There the legislation recognizes that simple proximity to a project prohibits a person participating in a quasi-judicial proceeding. As noted above, there is no quasi-judicial proceeding being considered, or likely to be considered, at this time. Thus, for the administrative consideration facing Council, proximity is simply not a criterion.

This conclusion is also consistent with court interpretations regarding a governmental body’s consideration of an action that has general applicability to the community. If an action impacts a wide portion of a community’s citizen the individual impact on a Council member, even it to that member’s financial benefit, does not require recusal.

Finally, it must be noted that there is no mechanism here that would allow staff or the majority of Council to prohibit Councilor Guth from participating in the decision making on this issue, even if a conflict were deemed to exist. There is a local process set forth in Sec. 2.16.010 that can lead to removal, censure or condemnation of a “city officer.”. However, although “officer” itself is not defined, in the context of this provision and consistent with the definition of “official”, the Mayor and City Council members are excluded. Under state codes, the only penalty would be financial, particularly the loss of the personal financial gain. And, under state and local codes, the only process for removal is recall.

In conclusion, it is my opinion that there is no conflict or other ethical violation of Councilor Guth to warrant further discussion.

Let me know if you have any questions.

Thanks.

Dear Mayor and Aspen City Council Members:

I emailed City Manager Sara Ott regarding my concerns with Councilman Bill Guth's conflict of interest regarding his official votes and influence as it relates to the Entrance to Aspen and his ownership of his house in the Preferred Alternative adjacent neighborhood. Sarah connected me with Aspen City Attorney, Jim True. Jim and I had a good phone conversation, but in the end he informed me that he did not want to pursue further action regarding Councilman Guth's conflict of interest. I would appreciate it if council members would consider the points that I have made in this letter. I think they clearly support action by the City of Aspen regarding Councilman Guth's past, present and future influence as it pertains to the Entrance to Aspen.

1. A basic, common sense, universally accepted ethical tenet regarding those in government is that elected officials should not use their position of power for personal gain and should avoid conflicts of interest such as financial interests, including property.
2. Ordinance No. 19 (Series 2003)

“AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ASPEN, COLORADO, AMENDING TITLE 2 OF THE CITY OF ASPEN MUNICIPAL CODE, ADMINISTRATION, BY THE ADOPTION OF A NEW CHAPTER 2.02, RULES OF ETHICAL CONDUCT.

WHEREAS, Section 4.7 of The City of Aspen Home Rule Charter prohibits members of council from voting “on any question in which he has a substantial personal or financial interest, other than a common public interest, or on any question concerning his own conduct;” and

WHEREAS, The Colorado State Legislature has adopted a Code of Ethics which include rules of conduct for local officials and employees; and

WHEREAS, The City Council adopted Ordinance No. 50, series of 1979, to define conflict of interests and to regulate the conduct of City officials deemed to have a conflict of interest; and

WHEREAS, The City Council recognizes that “government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people” (Henry Clay Speech at Ashland, Ky., March 1829); and

WHEREAS, the City Council desires to update the rules of conduct for members of Council, members of appointed City boards, authorities and commissions, and City employees to ensure that people maintain their trust in city government.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ASPEN, COLORADO:"

Source:<https://records.aspen.gov/WebLink/DocView.aspx?id=33222=0&c>

3. The Code of Ethics of the State of Colorado which has been adopted by the City of Aspen states:

According to the Colorado "Code of Ethics" (which includes conflicts of interest) For Public Officials and Employees- C.R.S. 24-18-109:

A local official or employee shall not:

"Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest (which includes "ownership interest in real or personal property"), or is engaged as counsel, consultant, representative or agent." C.R.S. 28-18-102.

"Official act" is defined as any "vote, decision, recommendation, approval, disapproval, or other action, including in-action, which involves use of discretionary authority." C.R.S. 24-18-102.

Source:<https://url.avanan.click/v2/> https://www.cml.org/docs/default-source/uploadedfiles/issues/ethics/ethics_conflict_of_interest.pdf?sfvrsn=99be1361_2.YXAzOmNpdHlvZmFzcGVuOmE6bzplNTUxNWViYjgzZmQyOWQ5MmlwMWlyYzgyZTNhN2QxMTo2OmU0ZjE6MjA1NjlmMDMwOWU3MjNjMGI5NWU3ZmVkYWEzODhmZTg0YWZiNjM0M2NjODdhNzQ1OWMzNTBiNDUxNTdjYjE0YTp0OkY6Tg

In the May 16, 2023 Aspen Times, it was reported that:

"Councilman Bill Guth who lives in the most affected neighborhood, spoke of studying a web of traffic improvements and other bridge ideas, even another bridge over the power plant, saying there was no way he would vote for anything like the Preferred Alternative."

In the May 29, 2024 Aspen Times article titled “Aspen Approves Expanded Castle Creek Investigation”: “City Councilman Bill Guth said he did not see the value in analyzing economic impacts if the project eventually goes forward” I do not think this should be the primary driver in decision making he said.”

These are just 2 examples of Councilman Bill Guth exposing his conflict of interest. It appears to me that The Aspen City Council has been heavily influenced by Councilman Guth and a vocal group of Preferred Alternative property adjacent owners to steer the Entrance to Aspen project away from the City of Aspen’s engineers and planners, CDOT engineers and experts. My hope is that the City Council takes up this question and proceeds appropriately with regard to what I see as a clear ethical violation. It seems obvious to me that Councilman Guth should recuse himself from issues regarding the Entrance to Aspen.

Unlike the anti-Preferred Alternative group and their letters to the editors, I think it is fair to inform you that my wife and I live on 10 Harbour Lane, just south of the Castle Creek Bridge and will be highly affected (perhaps losing our home of 38 years) by the three lane shifted option being pushed by the Preferred Alternative property adjacent owners. As we are in Pitkin County and cannot vote in the City of Aspen, we are counting on the Aspen City Council to act fairly and ethically regarding the Entrance to Aspen issue.

Sincerely, Kirk Gregory