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Dino Ioannides, *Executive Director*

Advisory Opinion 17-10 (Conflict of Interest and Appearance of Impropriety)

Summary: Under the facts and circumstances presented in the request, it would not be a violation of Article XXIX for the Requester to serve as county assessor or county treasurer and public trustee, while maintaining employment in the mortgage loan origination industry. However, the Commission cautions the Requester that a conflict of interest or an appearance of impropriety may arise based on the uniqueness of his role in each.

I. Background

The Requester is a term-limited Teller County Commissioner who is also employed at a local community bank. The Requester operates the bank's mortgage department. The Requester is considering running for either Teller County Assessor or Teller County Treasurer/Public Trustee.

The Requester has asked the Commission whether, if he were to be elected as either County Assessor or County Treasurer and Public Trustee, his continued private employment at the bank or independent ownership of a mortgage brokerage firm would create any ethical conflicts or the appearance of impropriety.

II. Jurisdiction

The Requester, a Teller County Commissioner, is a "local government official" subject to the Commission's jurisdiction. Colo. Const. Art. XXIX, § 2(3). The Teller County Assessor and Teller County Treasurer and Public Trustee are also local government officials subject to the Commission's jurisdiction under Article XXIX.

III. Applicable Law

Section 5(1) states in part, "The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law."

The Commission looks to the Purposes and Findings section, Section 1, of Article XXIX for guidance in addressing this question. It states, in pertinent part:

- (a) The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;
- (b) They shall carry out their duties for the benefit of the people of the state;
- (c) They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;
- (d) Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust...

Part 1 of title 24, article 18, C.R.S., is the “Code of Ethics” for, among others, local government officials. These statutes set forth ethical principles, address financial conflicts of interest and present standards of conduct for public officers, local government officials, and employees.

One of the rules of conduct for local government officials, relevant to this inquiry, found in § 24-18-109, C.R.S., states:

- (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[.]

IV. Discussion

The request is prospectively seeking guidance for many unforeseen circumstances over many years. The Commission is in no position to grant carte blanche approval to the variety of ethical dilemmas which may later arise. Simply stated, the Commission is reluctant to dissuade any office seeker from seeking election. At most, the Commission can only provide general ethical guidance and remind a candidate that it will be their duty, if elected, to ethically perform the duties of the office at all times.

County Assessors, County Treasurers, Public Trustees

The major duties of a county assessor include discovering, listing, classifying, and valuing all taxable real and personal property located within the county. Some property in the county is classified by the assessor as exempt. Property is valued by the assessor following valuation criteria including those stipulated by statute. Valuation includes notifying taxpayers of property values and administrative remedies. Assessors deliver tax warrants to the treasurer for collection.¹

The role of a county treasurer is, *inter alia*, to collect and disburse school funds, to receive all monies belonging to the county, to deposit such monies, to pay out monies for the use of the county, to keep and settle county accounts, to collect county taxes, and to assess property taxes

¹ Assessor’s Reference Library, Vol. 2, “Administrative and Assessment Procedures”. Issued pursuant to § 39-2-109(1)(e), C.R.S.

when the county assessor has not. *See generally* Colo. Const. Art. IX, § 4, and § 30-10-701, *et seq.*, C.R.S.

The role of a public trustee is, generally, to act for the public in administering deeds of trust. This includes, *inter alia*, executing releases of deeds of trust, performing foreclosures, and acting as escrow agent for moneys paid by a purchaser to meet property tax obligations. *See generally* § 38-37-100.5, *et seq.*, C.R.S. In some counties in Colorado, such as Teller County, the county treasurer also serves as the public trustee. *See* §§ 30-1-101(1)(d), 38-37-101, and 38-37-102(2), C.R.S. Colorado is unique in that a Public Trustee serves as a public officer.²

Requester's Bank Duties and Responsibilities

Much as the Commission is reluctant to dissuade any office seeker from seeking election, the Commission also reminds the requester that it has no control over what private employment the Requester may pursue. At most, the Commission can only provide general ethical guidance and remind a candidate that it will be their duty, if elected, to ethically perform the duties of the office at all times.

Currently, the Requester is a salaried employee of the bank. Requester currently represents that he works in the bank's mortgage department, originating brokered mortgage loans on behalf of the bank. Doing so involves working with the bank's clients to analyze their loan qualifications and advising them about available financing options. Requester represents that the bank does not fund these brokered transactions; this is done, rather, by investors such as Ginnie Mae wholesalers. All brokered transactions are closed and disbursed by a title insurance company.

When a client is not approved through the bank's investors for conventional or government financing, the Requester may complete a mortgage directly through the bank and maintain the file until paid within the bank's portfolio. In these cases, the Requester originates the loan with the client and closes the loan internally, disbursing the funds through a title company. The Requester is also a voting member of the bank's internal loan committee, which considers portfolio loans for approval.

Although Requester represents that Teller County "almost never" has a foreclosure proceeding, the Commission anticipates that such rights are secured by legal instruments and the possibility remains that foreclosures may occur in Teller County, if not now, perhaps in the future. Requester has not disclosed what his role might be in bank decisions regarding loan defaults and decisions to pursue foreclosure.

Conflict of Interest

Requester has identified no direct conflict of interest under the facts as presented. The obtaining of public office, if the Requester should be elected, does not necessarily result in an actual conflict. However, Colorado law prohibits a local government official from performing "an

² *See* Margaret T. Chapman, Jefferson County Public Trustee, *available at* <https://www.jeffco.us/DocumentCenter/View/1468> (last accessed Oct. 24, 2017).

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”. § 24-18-109(2)(b), C.R.S. While Requester is currently engaged as a representative of the bank, it is too speculative to assume that the Requester, by merely holding public office, would necessarily perform an official act that would affect the bank to its economic benefit. The same conclusion would be true for the general question of Requester independently owning a mortgage brokerage firm.

For more specific guidance on how to avoid conflicts of interest, the Commission would recommend seeking advice from highly respected officials in similar offices. For instance, the Commission is aware that many county assessors conduct appraisals or classifications of properties, but implement safeguards to avoid direct control over the final valuation of those properties. Similarly, the office of Treasurer/Public Trustee may allow departmentalization to avoid conflicts. Even if this is possible, the Requester still needs to anticipate the public’s perception of appearances of impropriety.

Appearance of Impropriety

Colo. Const. Article XXIX, sec. 1(c), requires covered individuals “to avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated.” Appearances of impropriety are generally referred to as “perception issues” or “violating the smell test.” They can weaken public confidence in government and create a perception of dishonesty, even among government officials who are in technical compliance with the law.³

The Commission is unable to anticipate the public’s reaction to the Requester holding both a public position and private position in potentially overlapping fields. This is partially because the request is premised upon many unknown circumstances which may arise in the future. This is not a request where requester is seeking guidance regarding a short conference, with a known subject matter. Rather, the request seeks guidance for the entire term of office, or more. The best advice that the Commission can provide is for an office holder to continually evaluate office procedures and practices to insure that the public is being treated fairly, avoiding discretionary practices which would enrich the office holder and/or his business interests. Therefore, the Commission cautions the Requestor that an appearance of impropriety may arise at any time, which may at a minimum require his recusal in some activities and at its extreme may require him to resign from one of his positions.

V. Conclusion

Under the facts presented in this request, it would not be a violation of Article XXIX for the Requester to seek office as either the Teller County Assessor or the Teller County Treasurer/Public Trustee. At best, the Commission can only provide general guidance on how to avoid conflicts of interest in continuing his private employment in the banking industry or mortgage industry, if elected to the office of county assessor or county treasurer and public trustee. The Requester is reminded that appearances of impropriety may arise over the course of

³ See, e.g., Advisory Opinions 12-01 and 16-05.

providing public service and serving as a covered individual under Article XXIX. The Requester, not the Commission, is in the best position to assure public confidence that he may both perform his public and private duties ethically, and he must do so on an ongoing basis.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

The Independent Ethics Commission

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Dated: October 30, 2017