COLORADO INDEPENDENT ETHICS COMMISSION

Complaint Nos. 16-02 and 17-14

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF: MICHAEL DUNAFON

This matter comes before the Independent Ethics Commission ("Commission" or "IEC") on a complaint filed by M.A.K. Investment Group, LLC ("Complainant") against Michael Dunafon, the mayor for the City of Glendale. Complainant alleged various ethical violations surrounding Mr. Dunafon's votes on city business that involved businesses belonging to Mr. Dunafon's longtime romantic partner, Debbie Matthews, and Ms. Matthews's daughter-in-law. On Mr. Dunafon's Motion for Summary Judgment, the Commission narrowed the issues for hearing to the following:

1. Whether Respondent was required to, and failed to, disclose a personal or private interest in a matter on Glendale City Council consent agendas in violation of § 24-18-109(3)(a), C.R.S.;

2. Whether Respondent's conduct at the February 3, 2015, meeting of the Glendale City Council violated either § 24-18-109(2)(b) or -109(3)(a), C.R.S.; and

3. Whether Respondent attempted to influence the decisions of other members of the Glendale City Council at the March 17, 2015, meeting in violation of § 24-18-109(3)(a), C.R.S.

On June 18, 2024, the Commission held an evidentiary hearing and considered legal arguments and evidence presented by the parties. On July 8, 2024, the Commission held a special meeting for purposes of deliberating and receiving legal advice. For the reasons set forth below, the Commission has determined that:

1. Mr. Dunafon violated section 24-18-109(3)(a), C.R.S., when he voted on a matter involving Ms. Matthews's business because Mr. Dunafon had a personal or private interest in the vote;

2. Mr. Dunafon violated subsection -109(3)(a)'s disclosure provision at the February 3 and March 17, 2015, meetings because he had a personal or private interest in the vote;

3. Mr. Dunafon violated subsection -109(3)(a)'s disclosure provision at the April 7, 2015, and March 1, 2016, meetings with regards to consent agenda items involving Ms. Matthews's businesses;

4. Mr. Dunafon did not violate subsection -109(3)(a)'s disclosure provision at the September 1, 2015, meeting because he did not have a personal or private interest in Ms. Matthews's daughter-in-law's business;

5. Mr. Dunafon did not violate section 24-18-109(2)(b) because he lacked a substantial financial interest in both Ms. Matthews's business and that of her daughter-in-law;

6. Mr. Dunafon did not attempt to influence the decisions of other members of the Glendale City Council at the March 17, 2015, meeting within the meaning of subsection -109(3)(a), C.R.S.; and

7. No monetary penalty is warranted pursuant to Colo. Const. art. XXIX § 6.

I. FINDINGS OF FACT

8. The Glendale City Council consists of six councilmembers and a mayor.

9. Pursuant to the Glendale City Charter, the mayor "preside[s] over meetings of the Council" and has the right to vote "only in case of a tie." Glendale City Charter § 4.9.

10. Mr. Dunafon was the mayor of Glendale in 2015.

11. In February and March, 2015, Mr. Dunafon was in a long-term relationship with Ms. Matthews, whom he married in July, 2015.

12. Ms. Matthews's daughter-in-law is Lindsey Mintz.

a. Smoking Gun development plan application

13. The Glendale City Council received a Preliminary and Final Site Development Plan application ("Application") from Smoking Gun, a marijuana dispensary, which was first assigned to the City's Planning Commission.

14. The Planning Commission recommended approval of the Application with conditions.

15. At its February 3, 2015, regular meeting, the Glendale City Council held a hearing on the following agenda item: "Public Hearing for Concurrent and Final Site Development Plan and Special Use Permit, Smoking Gun."

16. According to the testimony of City Manager Chuck Line, the Glendale City Council had the authority to approve the Application, add additional conditions, or deny the Application.

17. Mr. Line testified that if the Application were denied, it would go back to the Planning Commission for further review.

18. Upon calling the Smoking Gun agenda item, Mr. Dunafon recused himself, stepped down from the dais, and turned chairmanship of the meeting over to Mayor Pro Tem Paula Bovo.

19. Mr. Dunafon did not give a reason for recusing himself.

20. Upon recusal, Mr. Dunafon sat in the front row of the audience facing the city councilmembers.

21. Ms. Matthews attended the hearing and answered questions regarding the Application.

22. After a presentation by Mr. Line and the Smoking Gun's architect regarding the Application, Ms. Matthews disclosed that she had a 73 percent ownership interest in Smoking Gun.

23. Following close of the public hearing, Ms. Bovo called for a motion.

24. One City councilmember voted to approve the Application and another seconded, after which the audio transcript became unclear as to "ayes" and "nays."

25. Ms. Bovo, who did not vote, announced the vote as "three nays, two ayes."

26. According to the meeting minutes, the three "nay" votes were councilmembers Joe Giglio, Doris Rigoni, and Dario Katardzic.

27. Ms. Bovo testified that she abstained from voting because she was presiding over the meeting and believed that was the appropriate procedure under Robert's Rules of Order.

28. Mr. Line stepped in and stated, "Well, Matt [Giacomini, the City Attorney] gets to talk about then when, when you have a tie on, and someone recuses himself, then with… I believe it's disclosure of the conflict… that you, you get to vote."

29. In the middle of Mr. Line's statement, Mr. Giacomini stated, "Right…" but did not otherwise advise the City Council.

30. Ms. Bovo testified that Mr. Dunafon angrily stormed back up to the dais. According to Mr. Giglio, his demeanor was "irritated…[and] pretty pissed."

31. Mr. Dunafon stated, "So there is no ownership on my part in this. I do this as an abundance of caution… So, according to the Charter, I vote yes and that breaks the tie. Let the record reflect that I'm back on as the chairman of the meeting…"

32. Less than a minute passed between Ms. Bovo's announcement of the vote and Mr. Dunafon's casting of his vote.

33. The meeting minutes incorrectly reported, "Mayor Dunafon took his place back on the dais. The Mayor noted his reasons for recusal. He voted yes, which broke the tie. The motion passed 4-3."

34. It is unclear from the audio transcript why Mr. Line, Mr. Dunafon, and the meeting minutes treated the 3-2 vote as a tied vote.

35. Ms. Bovo testified that the tenor of the room was "really tense" and that she was afraid to speak up and correct the record.

36. Following the February 3, 2015, meeting, Ms. Bovo heard Mr. Dunafon yelling at councilmembers who voted "nay" on the Application for embarrassing "his wife."

37. According to Mr. Giglio, following the February 3, 2015, meeting, City Attorneys, Mr. Giacomini and Mr. Jeff Springer, of Springer & Steinberg, P.C., conducted a special meeting where they provided attorney advice that city councilmembers were subject to personal liability if they did not approve development plans that met zoning regulations.

38. Springer & Steinberg also represented Smoking Gun.

39. Mr. Giglio testified that the implication from the city attorneys' presentation was that the Application met the zoning code, and that the meeting was "meant to put us in our place."

40. The Application was placed back on the City Council's agenda for its regular March 17, 2015, meeting.

41. At the March 17, 2015, meeting, Mr. Dunafon again recused from the City Council's consideration of the Application, again without explanation.

42. The City Council voted 5-1 to approve the Application.

b. Consent agenda items

43. At hearing, Ms. Bovo and Ms. Rigoni testified that Ms. Matthews has an ownership interest in Bavarian Inn Restaurant Incorporated d/b/a Shotgun Willie's.

44. Matters involving Shotgun Willie's appeared on City Council agendas in 2015 and 2016.

45. At hearing, Ms. Bovo testified that Ms. Mintz, Ms. Matthews' daughter-in-law, has an ownership interest in TEM and Company d/b/a T-Bar.

46. A matter involving T-Bar appeared on a City Council agenda in 2015.

47. Specifically, the following items appeared on City Council consent agendas:

    a. April 7, 2015: Consent agenda item for "Renewal of Tavern Liquor License for Bavarian Inn Restaurant Incorporated d/b/a Shotgun Willies [sic];"

    b. September 1, 2015: Consent agenda item for "Renewal of Tavern Liquor License for TEM and Company d/b/a T-Bar;" and

    c. March 1, 2016: Consent agenda item for "Renewal of Tavern Liquor License for Bavarian Inn Restaurant Incorporated d/b/a Shotgun Willies [sic]."

48. Mr. Dunafon presided over the meetings of April 7, 2015; September 1, 2015; and March 1, 2016.

49. Mr. Dunafon did not vote on the consent agendas.

50. Mr. Dunafon did not disclose any personal or private interest in the consent agenda items before calling for a vote on those items.

c. Mr. Dunafon's interest in businesses belonging to Ms. Matthews and Ms. Mintz

51. Mr. Dunafon declined to appear at the IEC hearing on this matter pursuant to a lawfully issued subpoena.

52. Mr. Dunafon waived service of the subpoena through counsel and did not file a motion to quash the subpoena.

53. Complainant was unable to serve subpoenas upon Ms. Matthews and Ms. Mintz.

54. In lieu of testimony from Mr. Dunafon regarding his interest in businesses owned by Ms. Matthews and Ms. Mintz, Complainant introduced evidence at hearing showing common ownership interest of properties by Mr. Dunafon and Ms. Matthews dating back to 1998.

55. At least one of those properties was held in joint tenancy with rights of survivorship.

56. At least one of those properties was quitclaimed from Ms. Matthews to herself and Mr. Dunafon for nominal consideration.

57. Multiple witnesses testified that Mr. Dunafon represented that he was married to Ms. Matthews, and that he referred to Ms. Matthews as his wife, prior to their civil marriage ceremony.

58. It was unrefuted at hearing that Mr. Dunafon and Ms. Matthews were in a longstanding romantic relationship for several years prior to their wedding.

59. Mr. Dunafon declined to appear for an investigative interview and declined to answer questions from the IEC's investigator regarding his interest(s) in Ms. Matthews's businesses.

60. Mr. Dunafon *did* comply with an investigation conducted by Glendale's city attorneys, and the investigator hired by those attorneys, Mr. Nathan Chambers, who testified at hearing.

61. Mr. Chambers testified to the content of his report, in which he considered whether Mr. Dunafon had a "substantial financial interest" in Ms. Matthews's businesses within the meaning of Glendale code provisions, and concluded that he did not.

62. Mr. Chambers did not review bank records or tax records. Mr. Chambers conducted interviews and determined that Mr. Dunafon and Ms. Matthews filed taxes separately until 2015, and began filing jointly after they were married, including for 2015.

63. Mr. Chambers determined, based on interviews with Mr. Dunafon and Ms. Matthews, that Mr. Dunafon did not have an ownership interest in the Smoking Gun.

64. Mr. Chambers determined, based on interviews with Mr. Dunafon, Ms. Matthews, and their accountant, that Ms. Matthews maintained separate bank accounts from Mr. Dunafon.

65. Mr. Chambers' report did not address whether Mr. Dunafon had either a personal or private interest in the Smoking Gun Application or any interest in TEM and Company, Ms. Mintz's business.

66. Complainant did not present evidence at hearing regarding whether Mr. Dunafon had any interest in TEM and Company.

II. CONCLUSIONS OF LAW

a. Jurisdiction

67. Mr. Dunafon is a member of the Glendale City Council and thus, a "local government official" within the meaning of section 2 of Article XXIX of the Colorado Constitution. The Commission has jurisdiction over Mr. Dunafon pursuant to section 5(1) of Article XXIX.

68. Mr. Dunafon was subject to the Commission's jurisdiction at the time of the events in question.

69. Mr. Dunafon is subject to the standards of conduct set forth in sections 24-18-103 and 24-18-109(3)(a), C.R.S. *See* Colo. Const. art. XXIX § 5(1).

70. The Commission has jurisdiction over ethical "standards of conduct," which the Colorado Supreme Court has defined as those standards of conduct which "relat[e] to activities that could allow covered individuals to improperly benefit financially from their public employment," including those set forth in part 1 of article 18. *Gessler v. Smith*, 419 P.3d 964, 972, 975 (Colo. 2018).

71. As set forth in the IEC's Order on September 6, 2023, Glendale—a home rule municipality—had not addressed the matters set forth in Article XXIX in 2015-16 such that Mr. Dunafon was exempt from the IEC's jurisdiction.

b. Section 24-18-109(3)(a), C.R.S.

72. Section 24-18-109(3)(a), C.R.S., provides that a member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon, and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.[1]

73. Mr. Dunafon is a member of the governing body of the City of Glendale, *i.e.*, the City Council. *See* Glendale Charter, §§ 4.1, 4.2, 4.6, 4.9.

[1] Mr. Dunafon did not argue that the exception to subsection -109(3)(a) for "participation necessary to obtain a quorum or otherwise enable the body to act" applied. *See* § 24-18-109(3)(b), C.R.S. Nevertheless, the IEC considers and finds the exception inapplicable. A quorum of the City Council was present, and the motion failed. Even if Mr. Dunafon were correct that the vote had been tied, that also would have constituted a failed motion.

c. Personal or private interest

74. Unlike the "substantial financial interest" prohibited by section 24-18-109(2)(b), which is well-defined in section 24-18-102, the statutory scheme does not provide a definition of "personal or private interest" as that term is used in section 24-18-109(3)(a).

75. Similarly, -109(2)(b) prohibits "official act[s]"—another term defined in section 24-18-102—while -109(3)(a) uses broader language, requiring disclosure and recusal on "any matter proposed or pending before the governing body."

76. The IEC takes into account both the plain language of subsection -109(3)(a) and the legislature's use of different statutory terms to mean different things. *See Fontanari, Trustee of Fontanari Revocable Trust v. Colo. Mined Land Recl. Bd.*, 529 P.3d 615, 622-23 (Colo. App. 2023). The language of subsection -109(3)(a) is conspicuously broader, and different than, that used in subsection -109(2)(b).

77. The term "personal or private interest" appears elsewhere in the Colorado Revised Statutes—usually requiring recusal of members of a regulatory body who have such an interest—and is likewise undefined in those statutory schemes. *See, e.g.*, §§ 43-1-106(17)(c), C.R.S. (Transportation Commission); 12-275-107(1)(d), C.R.S. (Board of Optometry); 24-21-630(2)(e), C.R.S. (Charitable Gaming Board).

78. Members of the General Assembly are constitutionally prohibited from voting on any measure or bill in which they have a "personal or private interest." Colo. Const. art. 5, § 43. A parallel statutory provision provides some guidance: "In deciding whether or not he has such an interest, a member shall consider, among other things, the following: (a) Whether the interest impedes his independence of judgment; (b) The effect of his participation on public confidence in the integrity of the general assembly; and (c) Whether his participation is likely to have any significant effect on the disposition of the matter." § 24-18-107(2), C.R.S. The statute also clarifies that "[a]n interest situation does not arise from legislation affecting the entire membership of a class." §24-18-107(3), C.R.S.

79. In *Russell v. Wheeler*, 439 P.2d 43 (Colo. 1968), the Colorado Supreme Court construed language requiring recusal of a judge on matters on which the judge had a "personal or private interest." In doing so, the Court distinguished between "what may be said to be a 'private' interest and a 'public' interest… A public interest is an interest shared by citizens generally in the affairs of local, state, or national government." *Id.* at 46. Because the judge in that case had an interest no different than those of other qualified taxpayers in the district, he was not required to recuse from a decision on the bond election contest. *Id.* at 47.

80. In the past, the IEC has found a "personal or private interest" where a town councilmember voted regarding his spouse's retention as the town clerk. *See* Complaint 17-31, *In the matter of: Steve Ricotta*. There, the spouses had combined finances, but the IEC stated that the "nature of the … relationship alone" was sufficient to demonstrate a personal or private interest in the matter. *Id.* at 7.

81. Precedent from other jurisdictions defining "personal or private interest" confirms that such an interest could be non-pecuniary, but must be distinct from that of the public at large or a particular class (*e.g.*, of taxpayers), and must be of such a quality that it "tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1); *see also McNamara v. Borough of Saddle River*, 158 A.2d 722, 728 (N.J. 1960) (A "personal or private" interest "which disqualifies a member of council to vote ... [is] not such an interest as he has in common with all other citizens or owners of property."); *Opinion of the Justs. No. 317*, 474 So. 2d 700, 703-04 (Ala. 1985) ("The conclusion is inescapable that the phrase 'personal or private interest' in Section 82 means an interest affecting the legislator individually or as a member of a small group."); Wyo. St. § 9-13-106 (public officials shall not vote on matters in which they have a personal or private interest, defined as "an interest which is direct and immediate as opposed to speculative and remote; and [i]s an interest that provides the public official… a greater benefit or lesser detriment than it does for a large or substantial group or class of persons who are similarly situated.").

82. Finally, the plain language of "personal interest" and "private interest" indicates a particularized interest, concerning an individual or company. The question here is whether Mr. Dunafon had such an interest in the approval of Smoking Gun's Application.

83. The IEC finds that Mr. Dunafon had such an interest. Mr. Dunafon was Ms. Matthews's longtime romantic partner, and Ms. Matthews was a 73 percent owner of the Smoking Gun. Mr. Dunafon and Ms. Matthews married five months after the February 2015 meeting, and filed their taxes jointly in 2015. They had common ownership of properties dating back to 1998. Whether or not Mr. Dunafon and Ms. Matthews shared finances, Mr. Dunafon was personally invested in Ms. Matthews's businesses based on the nature of their relationship. Such an interest was "direct and immediate as opposed to speculative and remote." *See* Wyo. St. § 9-13-106. If subsection -109(3)(a)'s "personal or private" language does not encompass matters involving direct benefits to one's longtime romantic partner, it's difficult to imagine a situation in which it does apply.[2]

[2] Mr. Dunafon has repeatedly argued that only a spousal relationship can rise to the level of a personal or private interest, without rationale for the distinction. The testimony at hearing

84. Applying the factors set forth in section 24-18-107, C.R.S., we reach the same conclusion. Mr. Dunafon's interest was distinct from that of the public at large, based on his relationship with Ms. Matthews. As evidenced by his behavior in rushing back to the dais to vote and berating fellow councilmembers for their votes after the City Council meeting, the interest in his partner's businesses was such that it impaired Mr. Dunafon's independence and impartiality. His involvement impinged upon public confidence that decisions regarding permit Applications would be made by an impartial, unbiased City Council. And his participation had a significant effect on the disposition of the matter, because, as discussed below, but for his involvement, the Application would have gone back to the Planning Commission. Accordingly, Mr. Dunafon had a personal or private interest in the approval of Smoking Gun's Application.

d. Effect of vote

85. The IEC next considers whether Mr. Dunafon "vote[d]" on approval of Smoking Gun's Application within the meaning of subsection -109(3)(a), when (1) there was not a tied vote, rendering his vote legally ineffective; and (2) the February 3, 2015, vote was ultimately obviated by the March 17, 2015, vote.

86. Subsection -109(3)(a) provides that a conflicted member of a local governing body "shall not vote" on any matter in which he or she has a personal or private interest. The dictionary definition of "vote" is "the expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." *Vote*, Black's Law Dictionary (12th ed. 2024).

87. Mr. Dunafon asks the IEC to read certain exceptions into the statutory provision. But the statute does not limit the prohibition to "official" or "legally effective" votes, nor does it contain an exception for improper votes that are later cured. In Complaint 18-08, *In the Matter of: Julie Cozad*, a county commissioner voted on a consent agenda that included an item for reimbursement of her legal expenses. The board of county commissioners later re-voted on that item, with the conflicted commissioner recused. The IEC determined that the re-vote could not retroactively cure the commissioner's violation, because she cast a vote on a matter in which she had a personal or private interest within the meaning of the statute.

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demonstrated that Mr. Dunafon and Ms. Matthews's relationship in February 2015 was such that other city councilmembers already believed them to be married, and that Mr. Dunafon represented them as such. While the IEC agrees that some relationships may not rise to the level of a spousal relationship, under the legal standard and facts presented in this case, it is a distinction without a difference.

88. Similarly here, Mr. Dunafon cast a vote and stated the intended effect: "I vote yes and that breaks the tie." Mr. Dunafon's vote was treated as a legally effective tie-breaking vote in the meeting minutes, and the confusion it caused resulted in a re-vote at the March 17, 2015, meeting, rather than the Application being sent back to the Planning Commission, which would have been the result in the absence of Mr. Dunafon's vote. Mr. Dunafon cast a "vote" within the meaning of subsection -109(3)(a).

89. Mr. Dunafon also argues that his vote at the February 3, 2015, meeting does not fall within the purview of subsection -109(3)(a) because it does not involve the exercise of discretion. Specifically, Mr. Dunafon argued that because the Smoking Gun Application constituted a permitted use under the City's zoning code, the City Council was required to approve that Application.

90. First, the fact that the matter was called for a vote indicates that some discretion existed. As explained above, the definition of "vote" is some action expressing one's preference, which inherently involves the exercise of discretion. Second, the evidence presented at hearing contradicts Mr. Dunafon's premise. Mr. Line, the City Manager, testified that the City Council had multiple options: It could approve the Application with staff conditions, approve the Application with different conditions, or outright deny the Application—in which case it would have gone back to the Planning Commission. Black's Law Dictionary defines "discretionary" as "involving an exercise of judgment and choice, not an implementation of a hard-and-fast rule exercisable at one's own will or judgment." Black's Law Dictionary (11th ed. 2019). While the City Council did not have unfettered discretion under its zoning code, it still had the authority to exercise its judgment as to the appropriate next steps for the Application.

91. In sum, Mr. Dunafon had a personal or private interest in a matter affecting his romantic partner's business, *i.e.*, approval of the Smoking Gun Application, and he voted on that matter in violation of section 24-18-109(3)(a), C.R.S.

e. Failures to disclose personal or private interest

92. Section 24-18-109(3)(a), C.R.S., also requires disclosure of any personal or private interest in a matter that is proposed or pending before the public body. As addressed above, Mr. Dunafon was a member of the City Council and had a personal or private interest in businesses in which his romantic partner had an ownership interest.

93. Subsection -109(3)(a) requires affirmative disclosure of the personal or private interest. Mr. Dunafon failed to disclose the nature of his interest.

94. Mr. Dunafon claims that the relationship between he and Ms. Matthews was widely known, and both Ms. Bovo and Mr. Giglio testified that they were aware of the relationship based on their roles on City Council. As an initial matter, the IEC notes that Mr. Dunafon's argument that his relationship was so well-known as to be self-evident is further evidence of his personal or private interest. But the statute does not contain an exception for self-evident conflicts, and "shall disclose" is mandatory. § 24-18-109(3)(a), C.R.S.

95. As the IEC found in Complaint 20-73, *In the matter of: Tom Flower*, when considering whether a county commissioner needed to disclose his personal or private interest in a matter involving his spouse, "the disclosure requirement is not merely for the benefit of other voting members of the body. The disclosure requirement benefits the public and serves the public interest in informing voters as to the interests of their elected representatives in the public business before them." Here, as in *Flower*, disclosure would have informed the public that Mr. Dunafon's romantic partner's business was the "primary beneficiary" of his vote at the February 3, 2015, meeting.

96. The same analysis applies to Mr. Dunafon's failure to disclose his personal or private interest in the consent agenda items regarding Shotgun Willie's at the April 7, 2015, and March 1, 2016, City Council meetings. While Mr. Dunafon was not a voting member of the City Council on those consent agenda items, the plain language of subsection -109(3)(a) still required his disclosure on a matter "pending before the governing body."

97. Mr. Dunafon was required to affirmatively disclose the nature of his personal or private interest in the agenda items involving Ms. Matthews' business at the February 3, 2015, April 7, 2015, and March 1, 2016, City Council meetings, and his failures to do so constituted violations of section 24-18-109(3)(a), C.R.S.

98. However, Complainant failed to present evidence of Mr. Dunafon's personal or private interest in Ms. Mintz's business, T-Bar. Without more, the relationship with one's romantic partner's daughter-in-law is qualitatively and quantitatively different from that of a longtime romantic partner, and the IEC cannot find a personal or private interest based solely on that relationship. Accordingly, Mr. Dunafon's failure to disclose a personal or private interest the consent agenda item "Tavern Liquor License for TEM and Company d/b/a T-Bar" at the September 1, 2015, meeting does not constitute a violation of section 24-18-109(3)(a), C.R.S.

f. Attempt to influence the decision of other members of the governing body

99. Section 24-18-109(3)(a), C.R.S., also prohibits a local government official from "attempting to influence the decisions of the other members of the governing body in voting on the matter" in which they have a personal or private interest.

100. Complainant presented evidence that Mr. Dunafon did not leave the room when he recused, but otherwise failed to provide evidence that Mr. Dunafon attempted to influence the votes of the other city councilmembers. According to Ms. Bovo, Mr. Dunafon berated city councilmembers for their votes after the meeting, but at that time, the vote had concluded and another vote had not yet been scheduled. And while Glendale's city attorneys held a special meeting that Mr. Giglio testified was intended to "put us in our place," Mr. Dunafon was not involved in that meeting. Complainant presented no evidence that Mr. Dunafon used the city attorneys as a conduit to influence the votes of other city councilmembers. The Commission finds that Mr. Dunafon's actions did not constitute an attempt to influence the decisions of the City Council in voting on the Smoking Gun Application within the meaning of subsection -109(3)(a), at either the February 3, 2015, or March 17, 2015, meetings.

g. Penalty

101. The penalty for breach of the public trust for private gain pursuant to section 6 of Article XXIX is "double the amount of the financial equivalent of any benefits obtained by such actions." Colo. Const. art. XXIX, § 6.

102. To assess a penalty, the Commission must find that: (1) Mr. Dunafon's actions constituted a breach of the public trust for private gain; and (2) a specific monetary benefit was "obtained by such actions." *Id.*

103. Complainant failed to present such evidence at hearing.[3] The only evidence regarding penalties was evidence that the Smoking Gun was sold in December, 2021, to a publicly traded cannabis company called Schwazze. Complainant failed to explain how that monetary benefit to Ms. Mathews was connected to the February 3, 2015, vote. And the evidence presented at hearing was to the contrary: Mr. Line testified that denial of the Application would have resulted only in the Application being sent back to the Planning Commission. Additionally, the March 17, 2015, re-vote removed any causal link Complainant sought to establish between approval of the Application and a financial

[3] Complainant also sought attorney's fees. No provision of Article XXIX grants the Commission authority to award attorney's fees.

benefit to Smoking Gun. *See* Complaint 18-08, *In the matter of: Julie Cozad* (finding no causal link between commissioner's vote to approve reimbursement of her legal fees when the matter was re-voted with her recusal); *see also* Complaint 17-31, *In the matter of: Steve Ricotta* (finding no causal link between a town trustee's vote in favor of his wife's bonus, where the vote was without effect because the bonus had been approved prior to his tenure).

THEREFORE, the Commission finds by a preponderance of the evidence that Mr. Dunafon violated section 24-18-109(3)(a), C.R.S., but that no penalty is warranted pursuant to section 6 of Article XXIX.

The Independent Ethics Commission

Daniel Wolf, *Vice-Chair*
Elizabeth Espinosa Krupa, *Commissioner*
Lora Thomas, *Commissioner*
Cole Wist, *Commissioner*, dissenting in part

Sarah Mercer, *Chair*, recused

Dated: September 20, 2024

Cole Wist, dissenting in part

I dissent from the majority's finding of a "personal or private interest," as that term is used in section 24-18-109(3)(a), C.R.S., and thus dissent from the majority's finding of a violation of that subsection. I concur with the majority's remaining conclusions.

Unlike the term "substantial financial interest" in section 24-18-109(2)(b), C.R.S., which is well-defined in section 24-18-102, C.R.S., the statutory scheme does not provide a definition of "personal or private interest" as that term is used in section 24-18-109(3)(a), C.R.S. When interpreting statutes, the IEC endeavors to effectuate the General Assembly's intent. *See H.J.B. v. People in Interest of A-J.A.B.*, 535 P.3d 67, 75 (Colo. 2023). The overall purpose of article 18 of Title 24, C.R.S., is "prescription of some standards of conduct" while recognizing that "some actions are conflicts *per se* between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances." § 24-18-101, C.R.S. In *Gessler v. Smith*, 419 P.3d 964 (Colo. 2018), the Colorado Supreme Court provided IEC-specific guidance in explaining that the IEC's jurisdiction is over "ethical standards of conduct relating to activities that could allow covered individuals to improperly benefit financially from their public employment." *Id.* at 969.

With this guidance in mind, I would adopt a definition that limits subsection -109(3)(a) to those situations in which the local public official has a pecuniary interest in the matter pending before the governing body. *See Russell v. Wheeler*, 439 P.2d 43, 46 (Colo. 1968) (In the context of judicial recusal, a personal or private interest includes one in which a "judge may benefit in a pecuniary way depending upon his decision."). In the absence of such a bright-line rule, a more subjective standard would require the IEC to evaluate the relative closeness of a personal relationship between a public official and an individual with a matter pending before the public body in order to determine whether a public official has a "personal or private interest" in the matter. Such a standard could result in widespread recusals in smaller cities and counties where public officials are well-known in the community. Differentiating between a public official's personal or private interests in matters involving a romantic partner, daughter-in-law, friend, acquaintance, or business partner would become a wholly subjective standard difficult for local public officials to comply with.

Limiting subsection -109(3)(a) to matters in which a pecuniary interest is present would be consistent with the IEC's interpretation in other cases. *See, e.g.*, Complaint 17-31, *In the matter of: Steve Ricotta* (town trustee had a personal or private interest in his wife's employment when they were married and shared finances); Complaint 20-73, *In the matter of: Tom Flower* (county commissioner had a personal or private interest in his wife's overtime pay based on their spousal relationship and the fact that he stood to benefit financially from approval of that overtime pay); Complaint 18-08, *In the Matter of: Julie Cozad* (county commissioner had a personal or private interest in reimbursement of her own legal expenses). While the IEC has previously relied partially on existence of a spousal relationship, it has never found a personal or private interest based solely on such a relationship, and I would decline to do so here.

In this respect, I would find that Complainant failed to carry its burden of proof. I am sensitive to the fact that Mr. Dunafon ignored a validly issued subpoena, to which he waived service; and that he failed to file a motion to quash. Complainant was unable to serve Ms. Matthews with her subpoena. Complainant's counsel explained that evidence of Mr. Dunafon and Ms. Matthews's financial entanglement could only have been provided through the testimony of those witnesses. However difficult it was for Complainant to obtain evidence of a pecuniary interest on Mr. Dunafon's part, the IEC does not have contempt authority over Mr. Dunafon. Complainant failed to file a motion to compel Mr. Dunafon to appear at the IEC hearing in Denver District Court, the entity with contempt authority over Mr. Dunafon. Based on the facts presented at hearing, I would not find that Mr. Dunafon had a pecuniary interest in Ms. Matthews's businesses.

Because I believe Complainant failed to demonstrate a pecuniary interest, I would find that Mr. Dunafon's vote at the February 3, 2015, meeting was not improper under

subsection -109(3)(a). I would not reach the remaining issues presented by that subsection, including whether Mr. Dunafon "vote[d]" within the meaning of subsection -109(3)(a), attempted to influence members regarding their votes, or failed to disclose a conflict on consent agenda items related to Ms. Matthews's businesses.