

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 20-18

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF: DAVID BOWMAN

This matter comes before the Independent Ethics Commission (“Commission”) on a complaint filed by Janece Culver and Western Slope Advocate CO (“Complainants”) against David Bowman, the former mayor of Montrose (“Respondent”). Complainants alleged various ethical violations surrounding Respondent’s dual roles as mayor and president of the Montrose Summer Music Series (“MSMS”). In its Notice of Issues for Hearing, the Commission set forth the potential violations as Sections 24-18-109(2)(a), -109(2)(b), and -109(3)(a), C.R.S., which the Commission has jurisdiction over pursuant to section 5(1) of Article XXIX of the Colorado Constitution. The Commission finds that it has jurisdiction over the allegations set forth in Complaint 20-18 because, although Montrose is a home rule municipality, it does not have code or charter provisions addressing the matters set forth in Article XXIX.

On July 18 and August 1, 2023, the Commission held an evidentiary hearing and considered legal arguments and evidence presented by the parties. For the reasons set forth below, the Commission has determined that Respondent did not violate any of the standards of conduct set forth in the Commission’s notice of issues for hearing.

I. FINDINGS OF FACT

a. Jurisdiction

1. In 2016, Respondent was elected to the Montrose City Council.
2. On April 9, 2019, Respondent was appointed mayor of Montrose.
3. The city of Montrose is a home rule entity incorporated under Section 6 of Article XX of the Colorado Constitution.
4. In 2019, the city of Montrose had the following code or charter provisions related to ethics:

- a. Montrose Charter, Art. 2, § 4: No member of the Council shall vote on any question in which he has a financial interest, other than the common public interest, or any question concerning his own conduct.
 - b. Montrose Code, § 1-14-1: The Municipal Court shall have jurisdiction of all causes arising under the City's Charter or ordinances, including prosecution of any violation of any provision of the City Charter or ordinances, including those ordinances which by their terms apply to City-owned property outside the City limits. The Municipal Court shall have jurisdiction of any other matters as provided by law.
 - c. Montrose Regulations Manual, § 5-7-3: *Ethics and Conflicts of Interest.* Officers and employees involved in the investment process shall refrain from personal business activity that could conflict with the proper execution and management of the investment program, or that could impair their ability to make impartial decisions. Employees and investment officials shall disclose to the City Manager any material financial interests in financial institutions that conduct business within this jurisdiction, and they shall further disclose any personal financial/investment positions that could be related to the performance of the City's investment portfolio. Employees and officers shall refrain from undertaking personal investment transactions with the same individual with whom business is conducted on behalf of the City.
5. The Montrose City Code generally provides that violations of the code or charter shall be adjudicated by the Municipal Court. Montrose Code § 1-2-3.

b. MSMS Concert Series

6. During his tenure as mayor, Respondent was president of the MSMS.
7. The MSMS is a non-profit 501(c)(3) incorporated in the state of Colorado.
8. Respondent started MSMS in 2015 to hold summer concerts in Montrose between June and September on an annual basis.
9. From 2015 to 2019, MSMS held free summer concerts at the city-owned golf course, Black Canyon Golf Course.

10. Respondent's role as president was to raise the majority of funds for MSMS and book musical performers.

11. In 2019, Respondent was the only paid individual working for MSMS, receiving \$3,200 in 1099-MISC income as an independent contractor.

12. From 2015 to 2018, Respondent solicited a sponsorship of the MSMS from the previous concessionaire of the Black Canyon Golf Course, Horsefly Brewing.

13. Horsefly Brewing's sponsorship of the MSMS was based on the amount of the brewery's beer sales at the summer concerts.

c. Contract Between Divots and City of Montrose

14. On February 15, 2019, the city of Montrose signed a contract with a new concessionaire of the restaurant facilities at Black Canyon Golf Course, Janece Culver dba Divot's.

15. Divot's was selected as concessionaire of the restaurant facilities at Black Canyon Golf Course by the city manager following a request for proposal bid process.

16. Respondent, as mayor, was not involved in the selection of Divot's as concessionaire of the restaurant facilities at Black Canyon Golf Course because, under Montrose's "city manager" form of government, the city manager was responsible for such contracts.

17. The contract between Montrose and Divot's contained the following provisions:

- a. "[Divot's] agrees to provide the City a 1% share of net profits between April 1, 2019 through September 30th, 2019... Revenue from all sales, including private parties, will be included in the calculation of net profits."
- b. "[Divot's] agrees to accommodate special events and extended hours as necessary for tournaments, leagues and special event activities."
- c. "[Divot's] agrees to promote Black Canyon Golf Course special events (including but not limited to golf tournaments and promotional sales) and Contractor special events (including but not limited to live music, parties, food and drink specials, as examples) through social media."

18. Montrose is a local licensing authority for purposes of issuing liquor licenses under § 44-3-312, C.R.S.

19. Pursuant to statute, the Montrose City Council is required to hold a public hearing on each liquor license application it receives and determine whether the applicant has satisfied the needs and desires of the community, along with prescribed statutory criteria. §§ 44-3-311 and -312, C.R.S.

20. On April 16, 2019, the Montrose City Council held a public hearing on Divot's application for a liquor license.

21. Respondent was not in attendance at the April 16, 2019, City Council meeting.

22. On April 24, 2019, the Montrose City Council issued a liquor license to Divot's.

23. Divot's liquor license was signed by Respondent.

24. Respondent's signature was a stamp that was affixed to Divot's liquor license by the city clerk.

d. 2019 Concert Series

25. In 2019, MSMS held four concerts at the Black Canyon Golf Course between June 7, 2019, and September 6, 2019.

26. In late April or early May 2019, Respondent approached Ms. Culver, the owner of Divot's, to explain how previous concessionaire sponsorship arrangements with MSMS had been structured.

27. Specifically, Respondent told Ms. Culver that MSMS would provide cups for the music series, and Ms. Culver would pay MSMS \$2.00 per beer sold, \$1.00 per refill, and \$0.50 per can of beer sold.

28. Ms. Culver testified that she did not feel comfortable declining the "sponsorship" arrangement because Respondent was the mayor, Divot's was a new business, Divot's was located in a city facility, and her contract with the city required her to support special events at Black Canyon Golf Course.

29. No written contract was entered between Divot's and MSMS.

30. Following the June 7, 2019, music series, Respondent told Ms. Culver that she should also donate the profits from food truck sales to MSMS.

31. Ms. Culver reached out to the assistant city manager, Ann Morgenthaler, to express concerns regarding the lack of a written contract with MSMS.

32. Ms. Morgenthaler conveyed to Ms. Culver that if she did not want to sponsor MSMS, she could give up her liquor license for MSMS events and the city would grant MSMS a special festival license, instead.

33. Divot's continued the payment arrangement with MSMS throughout the 2019 concert series.

34. According to MSMS accounting records, Divot's paid MSMS a total of \$6,379.50 from June through September 2019 for "Beer & cup sales" during the concert series.

35. MSMS paid a total of \$2,278.34 to purchase the cups for the concert series.

e. Liquor Enforcement Division Investigation

36. In April 2020, Ms. Culver became concerned that the sponsorship arrangement between Divot's and MSMS may violate Colorado liquor licensing laws, and self-reported to the Department of Revenue's Liquor Enforcement Division.

37. Following an investigation, the Liquor Enforcement Division found violations of the following statutes:

- a. § 44-3-301(3)(a), C.R.S. (allowing another business to utilize the privileges of a liquor license); and
- b. § 44-3-901(1)(h), C.R.S. (sale of alcohol without a license).

38. Because Ms. Culver self-reported the violation, the Liquor Enforcement Division closed the case with a warning letter to Divot's.

39. The Liquor Enforcement Division referred the case to the Montrose District Attorney's Office, which referred the case to the Colorado Bureau of Investigation.

40. No criminal case was filed against either Respondent or Ms. Culver.

41. Subsequent to the Liquor Enforcement Division investigation, Respondent changed the MSMS profit-sharing structure for beer and alcohol sales.

f. Renewal of Divot’s License and Cancellation of Concessionaire Contract

42. Divot’s liquor license was auto-renewed on March 18, 2020.

43. Respondent’s signature appears on Divot’s liquor license renewal, but Respondent took no action regarding the renewal and his signature was a stamp affixed by the city clerk who processed the renewal.

44. On October 14, 2020, Ms. Culver received a Notice of Non-Renewal of Divot’s concessionaire contract from the city of Montrose.

45. The Notice provided that Divot’s contract would expire on December 31, 2020.

46. Montrose City Manager William Bell testified at hearing that he had made the decision not to renew Divot’s contract with the city.

47. Mr. Bell testified that he did not consult with Respondent or City Council in choosing not to renew Divot’s contract.

48. City staff gave varying reasons for the nonrenewal of Divot’s contract: Ms. Morgenthaler testified that the city wanted to run the restaurant itself, while Mr. Bell testified that “we didn’t trust that the receipts we were being given were accurate.”

49. Ms. Culver closed down the Divot’s restaurant following the city’s nonrenewal of her contract.

II. CONCLUSIONS OF LAW

a. Jurisdiction

50. Respondent was the mayor of Montrose at the time of the events in question and thus, a “local government official” within the meaning of Section 2 of Article XXIX of the Colorado Constitution. The Commission has jurisdiction over Respondent pursuant to Section 5(1) of Article XXIX.

51. Section 7 of Article XXIX contains a carve-out from the Commission’s jurisdiction for employees and public officials of home rule cities and counties that have “adopted charters, ordinances, or resolutions that address the matters covered by this article.”

52. Article XXIX sets forth “specific standards to guide [the] conduct” of public officials and employees “to ensure propriety and to preserve public confidence.” Colo. Const. art. XXIX, § 1(a), (e).

53. In light of the matters covered by Article XXIX, the Commission has interpreted Section 7 as exempting from its jurisdiction home rule cities and counties that have adopted charter or code provisions addressing the following:

- (1) a gift ban, *see* § 3;
- (2) a complaint and investigative process, *see* § 5(3)(a), (c);
- (3) a penalty provision or discipline process, *see* §§ 5(3)(d), 6; and
- (4) an independent decisionmaker, *see* § 5(1)(2).

See Complaint 17-28, *In the Matter of Julie Cozad*. The Commission does not consider whether the locality’s code or charter provisions are adequate, but does look to the plain language of the locality’s code or charter to determine whether such procedures are in place. *Id.*

54. Applying those considerations to the plain language of Montrose’s code and charter, the Commission finds that Montrose lacks a gift ban, a complaint and investigative process, and a penalty provision or discipline process.

55. Montrose does not qualify for the home rule exemption in § 7 of Colo. Const. art. XXIX and, therefore, the Commission has jurisdiction over Respondent.

b. § 24-18-109(2)(a), C.R.S.

56. Section 24-18-109(2)(a), C.R.S. provides, “A local government official or local government employee shall not ... Engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties...”

57. “Business” is defined to include any corporation, “whether or not operated for profit.” § 24-18-102(1), C.R.S.

58. Therefore, “private business purposes” can include the business purposes of one’s non-profit corporation.

59. In negotiating a payment arrangement between MSMS and Divot's, Respondent engaged in a substantial financial transaction for MSMS's business purposes.

60. However, neither Ms. Culver nor Divot's was a person Respondent inspected or supervised in the course of his official duties. At hearing, Respondent established that he had no oversight over Divot's contract with the city or Divot's liquor license. Ms. Culver's subjective impression that Respondent was in a position to take an action against Divot's concessionaire contract or liquor license does not rise to the level of official oversight contemplated by the statutory provision.

61. Accordingly, Respondent did not violate § 24-18-109(2)(a), C.R.S.

c. § 24-18-109(2)(b), C.R.S.

62. Section 24-18-109(2)(b), C.R.S. provides, "A local government official or local government 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 or is engaged as counsel, consultant, representative, or agent..."

63. "Official act" is defined as "any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." § 24-18-102(7), C.R.S.

64. "Financial interest" is defined as "a substantial interest held by an individual" in a business including ownership interests, employment interests, and a directorship or officership in a business. § 24-18-102(4), C.R.S.

65. Respondent had a financial interest in MSMS, both by virtue of his work for and compensation received from MSMS and his directorship thereof.

66. However, Respondent took no "official act" that would have directly and substantially affected MSMS to its economic benefit. Even if MSMS economically benefitted from Divot's operation as the concessionaire, Respondent did not vote on the contract entered into between Divot's and Montrose. Respondent did not vote on issuance of Divot's liquor license. And Respondent took no other discretionary actions, in his mayoral capacity, that would have constituted an "official act" within the meaning of §24-18-109(2)(b), C.R.S.

67. Accordingly, Respondent did not violate § 24-18-109(2)(b), C.R.S.

d. § 24-18-109(3)(a), C.R.S.

68. Section 24-18-109(3)(a), C.R.S. provides, “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.”

69. Respondent undoubtedly had a personal or private interest in MSMS by virtue of his work for, compensation received from, and directorship of that non-profit.

70. However, even if the Commission were to find that Respondent’s interest in MSMS required his recusal on matters involving the Black Canyon Golf Course’s concessionaire, Respondent was absent for the only vote taken by the Montrose City Council—approval of Divot’s liquor license at the April 16, 2019, City Council meeting. And there was no evidence presented at hearing that Respondent attempted to influence the votes of other councilmembers at that meeting.

71. Accordingly, Respondent did not violate § 24-18-109(3)(a), C.R.S.

THEREFORE, the Commission finds that Complainants failed to establish a violation of the statutory standards of conduct applicable to Respondent by a preponderance of the evidence pursuant to § 5(3)(e) of Article XXIX.

The Independent Ethics Commission

Cole Wist, *Chair*

Sarah Mercer, *Vice-Chair*

Elizabeth Espinosa Krupa, *Commissioner*

Lora Thomas, *Commissioner*

Daniel Wolf, *Commissioner*

Dated: September 11, 2023